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United States
Circuit Court of Appeals
FOR THE NINTH CIRCUIT

RUSSELL G. BELDEN and A. EUGENE WAY-
LAND,

Plaintiffs in Error,

vs.

THE UNITED STATES OF AMERICA,
Defendant in Error.

Transcript of Record

Upon Writ of Error to the United States District
Court for the Eastern District of Washing-
ton, Northern Division.

Filed
NOV 16 1914
F. J. Monahan,
Clerk.

No. _____

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*In the District Court of the United States for the
Eastern District of Washington, Northern
Division.*

UNITED STATES OF AMERICA,

Plaintiff,

vs.

R. G. BELDEN and A. E. WAYLAND,

Defendants.

Order Extending Time for Filing Printed Record.

This cause coming on duly and regularly to be heard on this 3rd day of September, A. D. 1914, on motion of the appellants for an order granting thirty days additional time from the time of certifying the Bill of Exceptions in the above entitled cause, within which to prepare and file the printed record in the above entitled cause with the Clerk of the Circuit Court of Appeals for the 9th Judicial Circuit at San Francisco, California, and good cause appearing therefor, and the Court being fully advised in the premises,

IT IS ORDERED that said motion be, and the same is hereby given thirty days from the time of certifying the Bill of Eceptions by the Court, in the above entitled cause, within which to file the printed record in the above entitled case with the said Clerk at San Francisco, California.

Dated this 3rd day of September, A. D. 1914.

[Endorsements]: Order extending time to print record.

(Signed) FRANK H. RUDKIN,
Judge.

Filed in the U. S. Circuit Court of Appeals for the
Ninth Circuit.....1914.

Clerk.

*In the District Court of the United States, Eastern
District of Washington, Northern Division.*

UNITED STATES OF AMERICA,

Plaintiff,

vs.

RUSSELL G. BELDEN, and
A. EUGENE WAYLAND,

Defendants.

No. 1881.

INDICTMENT—Vio. Sec. 215 Penal Code. (Use
of Mails to defraud.)

A True Bill,

GEO. T. CRANE,
Foreman.

*United States of America, Eastern District of Wash-
ington, Northern Division, United States
District Court,
September, 1913, Term.*

First Count

The Grand Jurors of the United States, chosen,
selected and sworn in and for the Northern Division
of the Eastern District of Washington, upon their
oaths present:

That RUSSELL G. BELDEN and A. EUGENE
WAYLAND (hereinafter referred to as the defend-
ants, and who are intended and referred to whenever
the words defendants may hereafter appear in this
indictment), On the 18th day of January, A. D. one

thousand nine hundred and eleven, in the Northern Division of the Eastern District of Washington and within the jurisdiction of this Court, having theretofore devised and intending to devise a scheme and artifice to defraud one, John Neiderer, and divers other persons to the Grand Jurors unknown, being all such persons from whom said defendants could or might obtain money or property by means of said scheme and artifice and the divers false and fraudulent pretenses, representations and promises hereinafter set forth, and being all of such persons with whom said defendants might or could get into communication through the United States mails, which said scheme and artifice to defraud was to be effected by the use and misuse of the United States Post Office establishment, intending to incite and induce such persons so intended to be defrauded, by means of printed circulars, letters and reports distributed through the mail, deposited and caused to be deposited in the said United States mail for mailing and delivery to such divers persons so intended to be defrauded, and by whatsoever other means as might occur to them as most practicable and feasible, to induce and incite the persons intended to be defrauded to open correspondence with them, the said defendants and with the several corporations herein mentioned organized for the purpose of aiding in the execution of said scheme to defraud, which said scheme and artifice to defraud so devised, and intended to be devised, by said defendants, and each of them, was substantially as follows:

That said defendants would cause to be organized and incorporated a corporation to be known and styled the International Development Company, which was to be controlled, managed and directed by said defendants, and each of them, and that the purpose of said corporation, among other things, should and would be to act as the fiscal agent of certain other corporations, and other firms and companies thereafter to be incorporated and organized and controlled by said defendants as a part of said scheme to defraud and to more effectually aid in the execution of said scheme.

That it was a part of said scheme that said defendants would, by themselves and through said International Development Company, and by other means under their control, procure, and cause to be procured and obtained, certain alleged coal claims having little or no value, situate in British Columbia, Dominion of Canada, and would cause to be organized and incorporated a corporation to be known as the Michel Coal Mines, Limited, with a capital stock of one million five hundred thousand shares of the par value of one dollar each, and that thereafter they would transfer to said Michel Coal Mines, Limited, the said claims, and that in consideration therefor the said Michel Coal Mines, Limited, would issue to them individually and to the said International Development Company a large majority of the capital stock of said corporation fully paid up; and it was further a part of said scheme that said defendants would thereafter in the manner aforesaid, procure and cause to be procured and obtained other claims adjoining

the aforesaid claims, and would thereafter cause to be incorporated and organized another corporation to be known as the Crown Coal and Coke Company, with a capital stock of two million shares of the par value of one dollar each, for the purpose of taking over said coal claims, which said claims would be transferred to said Crown Coal and Coke Company, and that in consideration therefor said Crown Coal and Coke Company would issue to said defendants and the International Development Company a large amount of the capital stock of said corporation as fully paid-up stock:

And it was further a part of said scheme to defraud, that said defendants, in the manner aforesaid, would procure and cause to be procured other claims, and would thereafter cause to be incorporated and organized another corporation to be known as the Empire Coal and Coke Company, with a capital stock of one million five hundred thousand shares of the par value of one dollar each, for the purpose of taking over said coal claims, which said coal claims would be transferred by said defendants and said International Development Company to said Empire Coal and Coke Company in consideration of the transfer to said defendants and to said International Development Company of a large majority of the capital stock of said corporation fully paid up;

And it was further a part of said scheme that defendants, in the manner aforesaid, would procure and cause to be procured, a charter for the construction

and operation of a railroad ostensibly to furnish transportation facilities for the product of the aforesaid alleged coal mines and to be operated in connection therewith, and would thereafter cause to be incorporated and organized a corporation to be known as the Crows' Nest and Northern Railway Company with a capital stock of twenty thousand shares of the par value of one hundred dollars each, for the purpose of taking over the said charter, which said charter would be transferred to the said Crows' Nest and Northern Railway Company in consideration of the transfer to said defendants and to the International Development Company, so under the control of said defendants, of a large amount of the capital stock of said corporation, fully paid up;

And it was further a part of said scheme that the balance of the capital stock of each of the aforesaid corporations, to-wit: The capital stock of the Michel Coal Mines, Limited; the Crown Coal and Coke Company; the Empire Coal and Coke Company, and the Crows' Nest and Northern Railway Company, not so transferred to said defendants and to the International Development Company, as aforesaid, should and would be and become the treasury stock of each of said corporations, respectively;

And it was further a part of said scheme to defraud so devised by the defendants that they should and would, from time to time, dispose of and sell for money, property and notes, large amounts of the capital stock of the various corporations aforesaid, which

had been transferred to themselves and to the International Development Company aforesaid.

And it was further a part of said scheme to defraud that by means of stock ownership in the aforesaid International Development Company and by other means under the control of said defendants, that said defendants would obtain and maintain management and control of said International Development Company; and by themselves and through the said International Development Company, ownership of stock and by other means under their control, and by manipulation of the stock, books and accounts of said various corporations, said defendants would obtain and maintain control of all of the aforesaid corporations, to-wit: the Michel Coal Mines, Limited; the Crown Coal and Coke Company; the Empire Coal and Coke Company; and the Crows' Nest and Northern Railway Company; with the intent and purpose to defraud the said divers persons.

And it was further a part of the said fraudulent scheme as so devised by said defendants that, in their own names, and in the name of the said International Development Company, their, and its officers, agents and employees, by means of letters, notices, reports, circulars, and prospectus sent and to be sent through the United States Post Office establishment; by oral representations and by whatsoever other means might occur to them as most practicable and feasible for the inducing of all persons who might or could be so induced to invest money in the purchase of shares of the

capital stock in the aforesaid various corporations, so controlled by said defendants, they, the said defendants, personally, and through their personal representatives, agents and employees, did represent, state and set forth that the stock of said various companies so organized and controlled as aforesaid, was of great value, and would become of still greater value; and that the properties owned by the said various companies were of great value and would become of still greater value as mining claims and for railroad purposes; whereas, in truth and in fact, as the defendants well knew, said property had little or no value and none of said properties had any value as mining claims or as railroad properties, except that the claims of the Crown Coal and Coke Company contained valuable deposits of coal, but the fact that the properties of the said Crown Coal and Coke Company did contain valuable deposits of coal was fraudulently used by said defendants and the said International Development Company to more effectively sell the worthless stocks of the aforesaid various corporations so held individually by said defendants and said International Development Company; and did falsely and fraudulently represent and pretend that the Michel Coal Mines, Limited, had valuable coal properties, and that the properties of the Empire Coal and Coke Company contained numerous veins of coal of very high quality, all of which was false as the defendants well knew at the time of making such representations; and did further falsely and fraudulently represent and pretend that the Crows' Nest and Northern Railway

Company had acquired a right-of-way for the construction of a railroad from the properties of the aforesaid mining corporations to the line of the Canadian Pacific Railway Company, in British Columbia, Canada, a distance of approximately fifteen miles, and would construct and operate said railroad in connection with said mines; and that the proceeds derived from the sales of stock of said corporations would be used to equip and develop said coal mines and build said railroad; and that the stocks of said corporations would greatly increase in value and said corporations would pay dividends; and that said defendants, so being in control of said various corporations, did represent that they would manage the affairs of said corporations to the best interest of all of the stockholders thereof; whereas, in truth and in fact as defendants well knew at the time of devising said scheme, and at all times in this indictment mentioned, that the Crows' Nest and Northern Railway Company had not acquired a right-of-way for its railroad as represented by them, and that the proceeds from the sales of stock of said corporations would not be, and were not, used to equip and develop the respective properties of said corporations or to build said railroad, but that a large sum realized from the sale of said stock was diverted to the use and benefit of said defendants, and that the stock of said corporations would not increase in value and said corporations would not pay dividends, and that the properties of said corporations would not be, and were not, managed and controlled for the best interest of the stockholders;

but would be, and were, managed and controlled for the sole benefit of said defendants, and each of them, with the intent and purpose to defraud the said divers persons.

And it was further a part of said scheme to represent to intending purchasers of the stock in the Empire Coal and Coke Company that with each five hundred dollar purchase of stock in said company there would be given a share of stock in the Crows' Nest and Northern Railway Company, and that of the proceeds received by said Empire Coal and Coke Company on account of said five hundred dollar purchase of stock by said divers persons, one hundred dollars would be used by the Empire Coal and Coke Company in the purchase of one share of stock in the Crows' Nest and Northern Railway Company, and the one hundred dollars so expended by said Empire Coal and Coke Company would be placed in the treasury of the said Crows' Nest and Northern Railway Company to be used in the construction of its railroad; whereas, in truth and in fact, as the defendants well knew, no part of the said one hundred dollars would be placed in the treasury of the Crows' Nest and Northern Railway Company and no part thereof would be used for the construction and development of said railroad, but would be, and was, appropriated by said defendants to their own use and benefit;

And it was further a part of said scheme that said defendants, in the false and fraudulent manner aforesaid, would hold forth, represent and pretend to the

divers persons intended to be deceived and defrauded thereby that the stock of the said various corporations to be offered and offered for sale would be the treasury stock of said various corporations, respectively, and that the money and property obtained from the sale of said stock would be used for the equipment and development of the properties of said corporations respectively; whereas, in truth and in fact, as defendants well knew, the stock of said various corporations so sold to said divers persons was not the treasury stock of said corporations, but was, with few exceptions, the stocks held individually by said defendants and said International Development Company so acquired as aforesaid, and the money and property obtained from such sales of stock was not placed in the treasury of said various corporations for development purposes, but a large amount of said money and all of the real property so obtained was appropriated by said defendants and the International Development Company to their own use and benefit, it being the intent and purpose of said defendants so having obtained large amounts of stocks having no commercial or marketable value and so having falsely represented that the property of the said various corporations was of great and immense value, and having so falsely pretended and represented that treasury stock was being sold and that the proceeds would be used for development purposes, to sell the said worthless stocks individually owned by said defendants, and each of them, and by the said International Development Company, so owned and controlled by said defendants, and to divert the vast

amount of property and a large amount of the money obtained, from the sale of said stocks to the use and benefit of the defendants and the said International Development Company, with the intent and purpose to defraud the said John Neiderer, and said divers persons.

And the said defendants, on or about the twenty-first day of January, one thousand nine hundred and eleven, at and in the Division and District aforesaid, for the purpose of executing said scheme and artifice, and attempting so to do, knowingly, willfully and feloniously, placed, and caused to be placed, in the Post Office of the United States, at Spokane, Washington, for mailing and delivery, a certain letter then and there addressed and directed to Mr. Jno. Neiderer, Summerville, Oregon, as follows, to-wit:

R. G. Belden,	Jas. A. Williams,	A. E. Wayland,
President	Vice-President.	Sec'y-Treas.
Industrial Securities	CAPITAL	
General Financing	\$250,000	

INTERNATIONAL DEVELOPMENT COMP'Y
P.O. Box 714 622-626 Peyton Block Phone Main 2142.
Spokane, Wash.

January
Eighteenth
1911

Mr. John Neiderer,
Summerville, Ore.

Dear Sir:

Your letter of the 16th inst. at hand with enclosure

of \$506.70, in payment of your two notes amounting to \$505. We are herewith returning postal money order for \$1.70 interest, owing to your having made the payment so promptly.

I am not returning the notes herewith, but am holding them as it occurred to me that it was an excellent opportunity for you to allow these two notes to stand and have more stock issued to you for them.

In other words, the date of the notes will allow me to pass them in as sales under the old prices which would be considerable saving to you.

For instance, the Empire is selling for 50c, while under this plan you would get it for 35c. The Crown is selling for \$1.00, and under this plan you would get it for 75c. You can readily see what a saving you would be making. You can select either stock you wish and I will protect you on it. However, if you decide that you should not want to do this, I will return the notes promptly to you. This would mean 674 shares in the Crown and it would mean a saving of \$169.00 to you over the present price. In the Empire it would give you 1443 shares or a saving of \$216.50 on the stock at the price it is today.

You understand, Mr. Neiderer, that we are not accepting any sales now, other than the 50c and \$1.00 price, and it is due to the peculiar circumstances of your money coming in at this time that I am figuring this way, and I am giving you the same benefit as you would have, were you an officer of the company. I also do it on account of your connection with Mr.

Hopson, and, by the way, we had our annual meeting yesterday, and Mr. Hopson was made a director and will be the Treasurer. He will hold these notes in his possession and would have no worry whatever in regard to their pressing you, as you will be dealing with him personally.

You certainly should make use of this opportunity for it is just the same as making that much money, and besides that, it will mean a great deal more as the stock continues to advance.

There is no doubt, Mr. Neiderer, but what Mr. Hopson and myself have been unable to make you fully realize just what valuable properties we have there. If you did, you certainly would be pleased at this opportunity.

Kindly let me know at once so that I may protect you in the matter.

Very truly yours,

INTERNATIONAL DEVELOPMENT CO.,
RGB|RC. Per R. G. Belden

P.S.—I am enclosing a copy of the Hower & Greene report. After you folks have read this over carefully, will ask you to kindly return it.;

contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States.

Second Count.

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further present:

That RUSSELL G. BELDEN and A. EUGENE WAYLAND (hereinafter referred to as the defendants, and who are intended and referred to whenever the word defendants may hereafter appear in this indictment), on the twenty-first day of January, A. D. one thousand nine hundred and eleven, in the Northern Division of the Eastern District of Washington, and within the jurisdiction of this Court, having theretofore devised and intending to devise a scheme and artifice to defraud one, Walter J. Wood, and divers other persons to the Grand Jurors unknown, being all such persons from whom said defendants could or might obtain money or property by means of said scheme and artifice and the divers false and fraudulent pretenses, representations and promises hereinafter set forth, and being all of such persons with whom said defendants might or could get into communication through the United States mails, which said scheme and artifice to defraud was to be effected by the use and misuse of the United States Post Office establishment, intending to incite and induce such persons so intended to be defrauded, by means of printed circulars, letters, and reports distributed through the mail, deposited and caused to be deposited in the said United States mail, for mailing and delivery to such divers persons so intended to be defrauded, and by whatsoever other means as might occur to them as most practicable and feasible, to induce and incite the

persons intended to be defrauded to open correspondence with them, the said defendants, and with the several corporations herein mentioned organized for the purpose of aiding in the execution of said scheme to defraud, which said scheme and artifice to defraud so devised, and intended to be devised, by said defendants, and each of them, was substantially as follows:

That said defendants would cause to be organized and incorporated a corporation to be known and styled the International Development Company, which was to be controlled, managed and directed by said defendants, and each of them, and that the purpose of said corporation, among other things, should and would be to act as the fiscal agent of certain other corporations, and other firms and companies thereafter to be incorporated and organized and controlled by said defendants as a part of said scheme to defraud and to effectually aid in the execution of said scheme.

That it was a part of said scheme that said defendants would, by themselves and through said International Development Company, and by other means under their control, procure, and cause to be procured and obtained, certain alleged coal claims, having little or no value, situate in British Columbia, Dominion of Canada, and would cause to be organized and incorporated a corporation to be known as the Michel Coal Mines, Limited, with a capital stock of one million five hundred thousand shares of the par value of one dollar each, and that thereafter they would transfer to said Michel Coal Mines, Limited, the said claims,

and that in consideration therefor the said Michel Coal Mines, Limited, would issue to them individually and to the said International Development Company a large majority of the capital stock of said corporation fully paid up;

And it was further a part of said scheme that said defendants would thereafter, in the manner aforesaid, procure and cause to be procured and obtained, other claims adjoining the aforesaid claims, and would thereafter cause to be incorporated and organized another corporation to be known as the Crown Coal and Coke Company, with a capital stock of two million shares of the par value of one dollar each, for the purpose of taking over said coal claims, which said claims would be transferred to said Crown Coal and Coke Company and that in consideration therefor said Crown Coal and Coke Company would issue to said defendants and the International Development Company a large amount of the capital stock of said corporation as fully paid up stock;

And it was further a part of said scheme to defraud, that the said defendants, in the manner aforesaid, would procure, and cause to be procured, other claims, and would thereafter cause to be incorporated and organized another corporation to be known as the Empire Coal and Coke Company, with a capital stock of one million five hundred thousand shares of the par value of one dollar each, for the purpose of taking over said coal claims, which said coal claims would be transferred by said defendants, and said

International Development Company to said Empire Coal and Coke Company in consideration of the transfer to said defendants and to said International Development Company of a large majority of the capital stock of said corporation fully paid up.

And it was further a part of said scheme that the defendants, in the manner aforesaid, would procure and cause to be procured, a charter for the construction and operation of a railroad ostensibly to furnish transportation facilities for the product of the aforesaid alleged coal mines, and to be operated in connection therewith, and would thereafter cause to be incorporated and organized a corporation to be known as the Crows' Nest and Northern Railway Company with a capital stock of twenty thousand shares of the par value of one hundred dollars each, for the purpose of taking over said charter, which said charter would be transferred to the said Crows' Nest and Northern Railway Company in consideration of the transfer to the said defendants and to the International Development Company so under the control of said defendants, of a large amount of the capital stock of said corporation fully paid up;

And it was further a part of said scheme that the balance of the capital stock of each of the aforesaid corporations, to-wit: the capital stock of the Michel Coal Mines, Limited; the Crown Coal and Coke Company; the Empire Coal and Coke Company, and the Crows' Nest and Northern Railway Company, not so transferred to said defendants and to the Interna-

tional Development Company as aforesaid, should and would be and become the treasury stock of each of said corporations, respectively:

And it was further a part of said scheme to defraud so devised by the defendants that they should and would, from time to time, dispose of and sell for money, property and notes, large amounts of the capital stock of the various corporations aforesaid, which had been transferred to themselves and to the International Development Company aforesaid;

And it was further a part of said scheme to defraud that by means of stock ownership in the aforesaid International Development Company and by other means under the control of said defendants, that said defendants would obtain and maintain management and control of said International Development Company; and by themselves, and through the said International Development Company, ownership of stock and by other means under their control, and by manipulation of the stocks, books and accounts of said various corporations, said defendants would obtain and maintain control of all of the aforesaid corporations, to-wit: the Michel Coal Mines, Limited; the Crown Coal and Coke Company; the Empire Coal and Coke Company; and the Crows' Nest and Northern Railway Company, with the intent and purpose to defraud the said divers persons;

And it was further a part of the said fraudulent scheme as so devised by said defendants that, in their own names, and in the names of the said International

Development Company, their, and its officers, agents and employees, by means of letters, notices, reports, circulars and prospectus, sent and to be sent through the United States Post Office establishment; by oral representations and by whatsoever other means might occur to them as most practicable and feasible for the inducing of all persons who might or could be so induced to invest money in the purchase of shares of the capital stock in the aforesaid various corporations, so controlled by said defendants, they, the said defendants, personally, and through their personal representatives, agents and employees, did represent, state and set forth that the stock of said various companies so organized and controlled as aforesaid, was of great value, and would become of still greater value; and that the properties owned by the said various companies were of great value and would become of still greater value as mining claims and for railroad purposes; whereas, in truth and in fact, as the defendants well knew, said properties had little or no value, and none of said properties had any value as mining claims or as railroad properties, except that the claims of the Crown Coal and Coke Company, contained valuable deposits of coal, but the fact that the properties of the said Crown Coal and Coke Company did contain valuable deposits of coal was fraudulently used by said defendants and the International Development Company to more effectively sell the worthless stocks of other aforesaid various corporations so held individually by said defendants and said International Development Company, and did falsely and fraudu-

lently represent and pretend that the Michel Coal Mines, Limited, had valuable coal property, and that the properties of the Empire Coal and Coke Company contained numerous veins of coal of very high quality, all of which was false, as the defendants well knew when making such representations, and did further falsely and fraudulently represent and pretend that the Crows' Nest and Northern Railway Company had acquired a right-of-way for the construction of a railroad from the property of the aforesaid mining corporations to the line of the Canadian Pacific Railway Company, in British Columbia, Canada, a distance of approximately fifteen miles, and would construct and operate said railroad in connection with said mines; and that the proceeds derived from the sales of stock of said corporations would be used to equip and develop said coal mines and build said railroad; and that the stocks of said corporations would greatly increase in value and said corporations would pay dividends; and that said defendants, so being in control of said various corporations, did represent that they would manage the affairs of said corporations to the best interest of all of the stockholders thereof; whereas, in truth and in fact, as the defendants well knew at the time of devising said scheme, and at all times in this indictment mentioned, that the Crows' Nest and Northern Railway Company had not acquired a right-of-way for its railroad as represented by them, and that the proceeds from the sales of said stock of said corporations would not be, and were not, used to equip and develop the respective properties of said corpora-

tions or to build said railroad, but a large sum realized from the sale of said stock was diverted to the use and benefit of said defendants and the International Development Company, and that the stock of said corporations would not increase in value and said corporations would not pay dividends; and that the properties of said corporations would not be, and were not managed and controlled for the best interest of the stockholders; but would be, and were, managed and controlled for the sole benefit of said defendants, and each of them, and the International Development Company, with the intent and purpose to defraud the said divers persons.

And it was further a part of said scheme to represent to intending purchasers of the stock in the Empire Coal and Coke Company that with each five hundred dollar purchase of stock in said company there would be given a share of stock in the Crows' Nest and Northern Railway Company, and that of the proceeds received by said Empire Coal and Coke Company on account of said five hundred dollar purchase of stock by said divers persons, one hundred dollars would be used by the Empire Coal and Coke Company in the purchase of one share of stock in the Crows' Nest and Northern Railway Company, and the one hundred dollars so expended by the Empire Coal and Coke Company would be placed in the treasury of the Crows' Nest and Northern Railway Company to be used in the construction of its railroad; whereas, in truth and in fact, as the defendants well knew at the time of making such representations, that no part of

the said one hundred dollars would be placed in the treasury of the Crows' Nest and Northern Railway Company and no part thereof would be used for the construction and development of said railroad, but would be, and was, appropriated to the use and benefit of the said defendants and the International Development Company.

And it was further a part of said scheme that said defendants, in the false and fraudulent manner aforesaid, would hold forth, represent and pretend to the divers persons intended to be deceived and defrauded thereby, that the stock of the said various corporations to be offered and offered for sale would be the treasury stock of said various corporations, respectively, and that the money and property obtained from the sale of said stock would be used for the equipment and development of the properties of said corporations, respectively; whereas, in truth and in fact, as defendants well knew at the time of making such representations, the stock of said various corporations offered and sold to divers persons was not the treasury stock of said corporations, but was, with few exceptions, the stocks held individually by said defendants and said International Development Company, so acquired as aforesaid, and the money and property obtained from such sales of stock was not placed in the treasury of said various corporations for development purposes, but a large amount of said money and all of the real property so obtained was appropriated by said defendants and the International Development Company to their own use and benefit, it being the intent and purpose of

said defendants so having obtained large amounts of stock having no commercial or marketable value, and so having falsely represented that the property of said various corporations was of great and immense value, and having so falsely pretended and represented that the treasury stock was being sold and that the proceeds would be used for development purposes, to sell the said worthless stocks individually owned by said defendants and each of them, and by the said International Development Company, so owned and controlled by said defendants and to divert the vast amount of property and a large amount of the money obtained from the sales of said stock to the use and benefit of the defendants and the said International Development Company, with the intent and purpose to defraud the said Walter J. Wood, and said divers other persons.

And the said defendants, on or about the twenty-first day of January, one thousand nine hundred and eleven, at and within the Division and district aforesaid, for the purpose of executing said scheme and artifice, and attempting so to do, knowingly, willfully and feloniously placed and caused to be placed, in the Post Office of the United States, at Spokane, Washington, for mailing and delivery, a certain letter then and there addressed and directed to Mr. Walter J. Wood, Waitsburg, Wash., as follows, to-wit:

R. G. Belden,	Jas. A. Williams,	A. E. Wayland,
President.	Vice-President.	Sec'y-Treas.
Industrial Securities	CAPITAL \$250,000	
General Financing.		

INTERNATIONAL DEVELOPMENT COMP'Y
P.O. Box 714. 622-626 Peyton Blk. Phone Main 2142
Spokane, Wash., Jan. 21, '11

Mr. Walter J. Wood,
Waitsburg, Wash.

Dear Sir:—

In addition to the formal notices herewith enclosed, we wish to suggest that in your Trustees' Meeting you carry out as nearly as possible the general wishes of the stockholders in reference to your election of officers.

The stockholders have generally expressed themselves as wanting David Still to take position of president and general manager, Mr. S. Simard as vice president, C. A. Bryan, treasurer, and R. Covington, secretary. The By-Laws provide that it is not necessary for the secretary or treasurer to be a member of the Board.

The Minutes of the Stockholders' Meeting are not yet ready, but will be forwarded to you prior to your Directors' Meeting.

At the Stockholders' Meeting they passed a resolution instructing the Board of Trustees to use their discretion in settling the affairs with the International Development Company, as provided by a certain resolution passed by the Stockholders at the annual

meeting held last year. In considering this matter, we would suggest that your Board pass a resolution reading approximately as follows:

“WHEREAS, a resolution was adopted at the annual meeting of the stockholders of this company, held at the principal office of the company, 624 Peyton Block, Spokane, Wash., Jan. 19, '11, at 2:00 P. M., instructing the board to use its discretion in the matter of cleaning up accounts and adjusting other matters in regard to the sale of stock of this company delegated to the International Development Company by certain resolution of record passed at the annual meeting of the stockholders of this company held at the principal office of the company January 20th, 1910.

NOW, THEREFORE, be it resolved that we hereby instruct and authorize the treasurer to accept from the International Development Company promissory notes received by that company for treasury stock sold by the said International Development Co., and the treasurer is further authorized to give a receipt for such notes, AND be it further provided that such checking up and acceptance of notes by the treasurer shall relieve the International Development Co. of all obligations assumed by them under the said resolution passed at the Stockholders' Meeting, January 20th, 1910.

We would call your attention further to the fact that you want to pass a resolution authorizing the amount of stock to be sold, the price and commission to be paid. As by resolution passed at the Stock-

fore devised and intending to devise a scheme and artifice to defraud one John S. Vinson and divers other persons to the Grand Jurors unknown, being all such persons from whom said defendants could or might obtain money or property by means of said scheme and artifice and the divers false and fraudulent pretenses, representations and promises hereinafter set forth, and being all of such persons with whom said defendants might or could get into communication through the United States mail, which said scheme and artifice to defraud was to be effected by the use and misuse of the United States Post Office establishment, intending to incite and induce such persons so intended to be defrauded, by means of printed circulars, letters and reports distributed through the mail, deposited and caused to be deposited in the said United States mail, for mailing and delivery to such divers persons so intended to be defrauded, and by whatsoever other means as might occur to them as most practicable and feasible, to induce and incite the persons intended to be defrauded to open correspondence with them, the said defendants, and with the several corporations herein mentioned organized for the purpose of aiding in the execution of said scheme to defraud, which said scheme and artifice to defraud so devised, and intended to be devised, by said defendants, and each of them, was substantially as follows:

That said defendants would cause to be organized and incorporated a corporation to be known and styled the International Development Company, which was to be controlled, managed and directed by said de-

fendants, and each of them, and that the purpose of said corporation, among other things, should, and would be, to act as the fiscal agent of certain other corporations, and other firms and companies thereafter to be incorporated and organized and controlled by said defendants as a part of said scheme to defraud and to more effectually aid in the execution of said scheme.

That it was a part of said scheme that said defendants would by themselves and through said International Development Company, and by other means under their control, procure, and cause to be procured and obtained, certain alleged coal claims having little or no value, situate in British Columbia, Dominion of Canada, and would cause to be organized and incorporated a corporation to be known as the Michel Coal Mines, Limited, with a capital stock of one million five hundred thousand shares of the par value of one dollar each, and that thereafter they would transfer to said Michel Coal Mines, Limited, the said claims, and that in consideration therefor, the said Michel Coal Mines, Limited, would issue to them individually and to the said International Development Company a large majority of the capital stock of the said corporation fully paid up;

And it was further a part of said scheme that said defendants would thereafter, in the manner aforesaid, procure, and cause to be procured and obtained, other claims adjoining the aforesaid claims, and would thereafter cause to be incorporated and organized another corporation to be known as the Crown Coal

and Coke Company, with a capital stock of two million shares of the par value of one dollar each, for the purpose of taking over said coal claims, which said claims would be transferred to said Crown Coal and Coke Company, and that in consideration therefor said Crown Coal and Coke Company would issue to said defendants and the International Development Company a large amount of the capital stock of said corporation as fully paid up stock;

And it was further a part of said scheme to defraud, that the said defendants would thereafter, in the manner aforesaid, procure, and cause to be procured and obtained, other claims adjoining the claims of the Crown Coal and Coke Company, and would thereafter cause to be incorporated and organized another corporation to be known as the Empire Coal and Coke Company, with a capital stock of one million five hundred thousand shares of the par value of one dollar each, for the purpose of taking over said coal claims, which said coal claims would be transferred by said defendants and said International Development Company to said Empire Coal and Coke Company in consideration of the transfer to said defendants and to said International Development Company of a large majority of the capital stock of said corporation fully paid up.

And it was further a part of said scheme that the defendants, in the manner aforesaid, would procure and cause to be procured, a charter for the construction and operation of a railroad ostensibly to furnish

transportation facilities for the product of the aforesaid alleged coal mines, and to be operated in connection therewith, and would thereafter cause to be incorporated and organized a corporation to be known as the Crows' Nest and Northern Railway Company, with a capital stock of twenty thousand shares of the par value of one hundred dollars each, for the purpose of taking over said charter, which said charter would be transferred to said Crows' Nest and Northern Railway Company in consideration of the transfer to the said defendants and to the International Development Company so under the control of said defendants, of a large amount of the capital stock of said corporation fully paid up.

And it was further a part of said scheme that the balance of the capital stock of each of the aforesaid corporations, to-wit: The capital stock of the Michel Coal Mines, Limited; the Crown Coal and Coke Company; the Empire Coal and Coke Company, and the Crows' Nest and Northern Railway Company, not so transferred to said defendants and to the International Development Company as aforesaid, should and would be and become the treasury stock of each of said corporations, respectively;

And it was further a part of said scheme to defraud so devised by the defendants that they should and would from time to time, dispose of and sell for money, property and notes, large amounts of the capital stock of the various corporations aforesaid, which had been

transferred to themselves and to the International Development Company aforesaid;

And it was further a part of said scheme to defraud that by means of stock ownership in the aforesaid International Development Company and by other means under the control of said defendants, that said defendants would obtain and maintain management and control of said International Development Company; and by themselves, and through the said International Development Company ownership of stock and by other means under their control, and by manipulation of the stocks, books and accounts of said various corporations, said defendants would obtain and maintain control of all of the aforesaid corporations, to-wit: The Michel Coal Mines, Limited; the Crown Coal and Coke Company; the Empire Coal and Coke Company, and the Crows' Nest and Northern Railway Company, with the intent and purpose to defraud the said divers persons;

And it was further a part of said fraudulent scheme as so devised by said defendants that, in their own names, and in the name of the said International Development Company, their, and its officers, agents, and employees, by means of letters, notices, reports, circulars, and prospectus sent and to be sent through the United States Post Office establishment; by oral representations and by whatsoever other means might occur to them as most practicable and feasible for the inducing of all persons who might or could be so induced to invest money and property in the purchase

of shares of the capital stock in the aforesaid various corporations, so controlled by said defendants, they, the said defendants, personally, and through their personal representatives, agents and employees, did represent, state and set forth that the stock of the said various companies so organized and controlled as aforesaid, was of great value, and would become of still greater value; and that the properties owned by the said various companies were of great value and would become of still greater value, as mining claims and for railroad purposes; whereas, in truth and in fact, as the defendants well knew, said properties had little or no value and none of said properties had any value as mining claims and for railroad purposes, except that the claims of the Crown Coal and Coke Company contained valuable deposits of coal, but the fact that the properties of the said Crown Coal and Coke Company did contain valuable deposits of coal was fraudulently used by said defendants and the International Development Company to more effectively sell the worthless stocks of the aforesaid various corporations so held individually by said defendants and the International Development Company, and did falsely and fraudulently represent and pretend that the Miche Coal Mines, Limited, had valuable coal property and that the properties of the Empire Coal and Coke Company contained numerous veins of coal of very high quality, all of which was false, as the defendants well knew at the time of making such representations; and did further falsely and fraudulently represent and pretend that the Crows' Nest and North-

ern Railway Company had acquired a right-of-way for the construction of a railroad from the properties of the aforesaid mining corporations to the line of the Canadian Pacific Railway Company in British Columbia, Canada, a distance of approximately fifteen miles, and would construct and operate said railroad in connection with said mines; and that the proceeds derived from the sale of stock of said corporations would be used to equip and develop said coal mines and build said railroad; and that the stocks of said corporations would greatly increase in value and said corporations would pay dividends; and that said defendants, so being in control of said various corporations did represent that they would manage the affairs of said corporations to the best interest of all the stockholders thereof; whereas, in truth and in fact, as the defendants well knew at the time of making such representations, and at all times in this indictment mentioned, that the Crows' Nest and Northern Railway Company had not acquired a right-of-way for its railroad as represented by them, and that the proceeds from the sales of said stock of said corporations would not, and were not, used to equip and develop the respective properties of said corporations or to build said railroad, but a large sum realized from the sale of said stock was diverted to the use and benefit of said defendants and the International Development Company, and that the stock of said corporations would not increase in value and said corporations would not pay dividends; and that the properties of said corporations would not be, and were not, managed and controlled

for the best interest of the stockholders; but would be, and were, managed and controlled for the sole benefit of said defendants, and each of them, and the International Development Company, with the intent and purpose to defraud the said divers persons.

And it was further a part of said scheme to represent to intending purchasers of the stock in the Empire Coal and Coke Company that with each five hundred dollar purchase of stock in said company, there would be given a share of stock in the Crows' Nest and Northern Railway Company, and that of the proceeds received by said Empire Coal and Coke Company on account of said five hundred dollar purchase of stock by said divers persons, one hundred dollars would be used by the Empire Coal and Coke Company in the purchase of one share of stock in the Crows' Nest and Northern Railway Company, and the one hundred dollars so expended by the Empire Coal and Coke Company would be placed in the treasury of the Crows' Nest and Northern Railway Company to be used in the construction of its railroad; whereas, in truth and in fact, as the defendants well knew at the time of making such representations that no part of the said one hundred dollars would be placed in the treasury of the Crows' Nest and Northern Railway Company and no part thereof would be used for the construction and development of said railroad, but would be, and was, appropriated to the use and benefit of the said defendants and the International Development Company.

And it was further a part of said scheme that said defendants, in the false and fraudulent manner aforesaid, would hold forth, represent and pretend to the divers persons intended to be deceived and defrauded thereby, that the stock of the said various corporations to be offered, and offered for sale would be the treasury stock of said various corporations, respectively, and that the money and property obtained from the sale of said stock would be used for the equipment and development of the properties of said corporations, respectively; whereas, in truth and in fact, as the defendants well knew at the time of making such representations, the stock of said various corporations offered and sold to divers persons was not the treasury stock of said corporations, but was, with few exceptions, the stocks held individually by said defendants and said International Development Company, so acquired as aforesaid, and the money and property obtained from such sales of stock was not placed in the treasury of said various corporations for development purposes, but a large amount of said money and all of the real property so obtained was appropriated by said defendants and the said International Development Company to their own use and benefit; it being the intent and purpose of said defendants so having obtained large amounts of stock having no commercial or marketable value, and so having falsely represented that the property of said various corporations was of great and immense value, and having so falsely pretended and represented that treasury stock was being sold and that the proceeds would be used for develop-

ment purposes, to sell the worthless stocks individually owned by said defendants, and each of them, and by the said International Development Company, so owned and controlled by said defendants, and to divert the vast amount of property and a large amount of the money obtained from the sales of said stock to the use and benefit of the defendants and the said International Development Company with the intent and purpose to defraud the said John S. Vinson and said divers other persons.

And the said defendants, on or about the third day of February, one thousand nine hundred and thirteen, at an dwithin the Division and District aforesaid, for the purpose of executing said scheme and artifice, and attempting so to do, knowingly, willfully and feloniously placed, and caused to be placed, in the Post Office of the United States, at Spokane, Washington, for mailing and delivery a certain letter then and there addressed and directed to Mr. John S. Vinson, Freewater, Oregon, as follows, to-wit:

R. G. Belden,	A. E. Wayland,	R. Covington
President.	V. Prest & Treas.	Secretary

INTERNATIONAL DEVELOPMENT COMP'Y
(Incorporated)

Suite 624 Peyton Block
Spokane Wash. February

Third

Mr. John S. Vinson,
Freewater, Oregon.

1913.

Dear Mr. Vinson:—

Received your enclosure of the 1st with a check

from Chas. Beckius for \$2.80 and check from Joel Howton for \$7.47, which are payments on voluntary assessments of one mill on the Empire.

I note what you say in regard to the matter, and as I am not posted as to just what disposition was to be made, I will turn the checks over to Miss Covington for her to check up with Mr. Wood, whom I find has also sent in this morning, some checks, but as I stated before, I am not familiar with what their plans were.

With kindest regards, I remain,

Yours very truly,

RGB|RC

R. G. BELDEN.

contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States.

FRANCIS A. GARRECHT,

United States Attorney.

E. J. FARLEY,

Asst. United States Attorney.

[Endorsements]: Indictment. Presented to the Court by the Foreman of the Grand Jury, in open Court, in the presence of the Grand Jury and filed in the United States District Court. January 12th, 1914. W. H. Hare, Clerk.

*In the District Court of the United States, for the
Eastern District of Washington, Northern
Division.*

UNITED STATES OF AMERICA,

Plaintiff,

vs.

RUSSELL G. BELDEN and

A. EUGENE WAYLAND,

Defendants.

Bill of Particulars.

In compliance with the order of the court, the Government advises the above named defendants that the "other means under the control" of said defendants whereby they obtained and maintained management and control of the various corporations referred to in the indictment were:

By means of securing the election of the officers of said various corporations.

By directing and controlling the official action of said officers, and through them the corporate acts of the said various companies.

By having the Inland Surety Company, a co-partnership, controlled by said defendants, act as the fiscal agent for the Michel Coal Mines, Limited; and by having the International Development Company act as the fiscal agent for the Crown Coal & Coke Company, the Empire Coal & Coke Company, and the Michel Coal Mines, Limited.

act as trustee for the Crow's Nest & Northern Railway Company, and by securing authority for the said International Development Company to vote the stock of the Crown Coal & Coke Company owned by the Crows' Nest & Northern Railroad Company, and by having the Crown Coal & Coke Company authorize defendant A. Eugene Wayland, to vote the stock of the Crows' Nest & Northern Railroad Company owned by it, at all meetings of the Crows' Nest & Northern Railroad Company.

By securing proxies to vote the stock of the said various corporations.

By organizing the British Columbia Investment Company, and by means of control thereof, control the Crown Coal & Coke Company.

Further, in compliance with the order of the Court, the Government advises the above named defendants that the manipulations of books and accounts of said various corporations referred to in said indictment were:

That the said defendants, by means of their control of said corporations as hereinabove pointed out, procured the passage of a resolution by the Crown Coal & Coke Company authorizing its manager, who was defendant Russell G. Belden, to incur and contract indebtedness upon its account in sums up to One Thousand Dollars (\$1,000.00) whereby said defendants were enabled to divert the money and credits of the said company to the Michel Coal Mines, Limited.

That said defendants, by means of their control of said various corporations as hereinabove pointed out, caused to be intermingled the money and credits of the various corporations so as to give to said defendants a personal financial advantage, and thereby were enabled to turn over to said corporations divers and sundry notes obtained by them for the sale of their individual stock in said corporations, and which notes were of doubtful or no value, and by causing the Crown Coal & Coke Company to exchange, for a large number of said notes of little or no value held by said defendants, the notes of the corporation.

By causing the Crows' Nest & Northern Railroad Company to pass a resolution authorizing the defendants to sell the stock owned by said corporation in the Crown Coal & Coke Company for Fifty (50) cents per share net to said corporation, whereby said defendants were enabled and did dispose of said stock for seventy-five (75) cents and one dollar (\$1.00) per share; and by procuring the passage of a resolution by the said Crows' Nest & Northern Railroad Company authorizing the sale of other stock owned by it in the Crown Coal & Coke Company at seventy-five (75) cents per share net to said company, whereby said defendants were enabled to, and did, sell the same for One Dollar (\$1.00) per share.

Dated this 31st day of March, A. D. 1914.

(Signed) FRANCIS A. GARRECHT,
United States Attorney.

[Endorsements]: Bill of Particulars. Service of

the within Bill of Particulars admitted to have been made the 31st day of March, 1914.

(Signed) DANSON, WILLIAMS & DANSON,
Attorneys for Defendants.

Filed March 31, 1914.

W. H. HARE, Clerk.
By F. C. NASH, Deputy.

*In the District Court of the United States, for the
Eastern District of Washington, Northern
Division.*

No. 1881.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

RUSSEL G. BELDEN and
A. EUGENE WAYLAND,
Defendants.

Demurrer.

Comes now the defendant, Russell G. Belden, and demurs to the indictment herein filed against him, reserving, however, the right to plead over in the event this demurrer should be overruled, and for cause thereof says:

As to the first count:

1. That the matters and things alleged in said first count do not constitute any offense against the laws or sovereignty of the United States.

2. That said first count of the indictment does not allege any offense of which this court has jurisdiction.

3. That said first count of the indictment was not returned within three years of the commission of the alleged offense and is barred by the statute of limitations.

4. That there is a misjoinder of parties defendant in said first count.

As to the second count:

1. That the matters and things alleged in said second count do not constitute any offense against the laws or sovereignty of the United States.

2. That said second count of the indictment does not allege any offense of which this court has jurisdiction.

3. That said second count of the indictment was not returned within three years of the commission of the alleged offense and is barred by the statute of limitations.

4. That there is a misjoinder of parties defendant in said second count.

As to the third count:

1. That the matters and things alleged in said third count do not constitute any offense against the laws or sovereignty of the United States.

2. That said third count of the indictment does

not allege any offense of which this court has jurisdiction.

3. That said third count of the indictment was not returned within three years of the commission of the alleged offense and is barred by the statute of limitations.

4. That there is a misjoinder of parties defendant in said third count.

As to the said indictment as a whole the said defendant demurs thereto for the reason that there is a misjoinder of counts.

WHEREFORE said defendant prays judgment sustaining said demurrer and that this defendant be relieved from further pleading to said indictment or any count thereof.

DANSON, WILLIAMS & DANSON,
Attorneys for said Defendant.

I, JAS. A. WILLIAMS, one of the attorneys for defendants, do hereby certify that the foregoing demurrer is, in my opinion, well founded in point of law.

JAS. A. WILLIAMS.

STATE OF WASHINGTON, }
County of Spokane. } ss.

JAS. A. WILLIAMS, being first duly sworn, on oath says: That he is one of the attorneys for Russell G. Belden, one of the defendants in this action, and

that the foregoing demurrer is not interposed for delay.

JAS. A. WILLIAMS.

Subscribed and sworn to before me this 27 day of Feb. 1914.

[Seal]

GEORGE D. LANTZ,

Notary Public for the State of Washington, residing at Spokane.

[Endorsements]: Demurrer. Filed in the U. S. District Court, Eastern Dist. of Washington, Mar. 27th, 1914. W. H. Hare, Clerk. Frank C. Nash, Deputy. Received a copy of the within Demurrer at Spokane, Wash., this 28th day of February, 1914. Francis A. Garrecht, Attorney for Plaintiff.

*In the District Court of the United States, for the
Eastern District of Washington, Northern
Division.*

No. 1881.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

RUSSELL G. BELDEN and
A. EUGENE WAYLAND,

Defendants.

Demurrer.

Comes now the defendant, A. Eugene Wayland, and demurs to the indictment herein filed against him, reserving, however, the right to plead over in the event

this demurrer should be overruled, and for cause thereof says:

As to the first count:

1. That the matters and things alleged in said first count do not constitute any offense against the laws or sovereignty of the United States.

2. That said first count of the indictment does not allege any offense of which this court has jurisdiction.

3. That said first count of the indictment was not returned within three years of the commission of the alleged offense and is barred by the statute of limitations.

4. That there is a misjoinder of parties defendant in said first count.

As to the second count:

1. That the matters and things alleged in said second count do not constitute any offense against the laws or sovereignty of the United States.

2. That said second count of the indictment does not allege any offense of which this court has jurisdiction.

3. That said second count of the indictment was not returned within three years of the commission of the alleged offense and is barred by the statute of limitations.

4. That there is a misjoinder of parties defendant in said second count.

As to the third count:

1. That the matters and things alleged in said third count do not constitute any offense against the laws or sovereignty of the United States.

2. That said third count of the indictment does not allege any offense of which this court has jurisdiction.

3. That said third count of the indictment was not returned within three years of the commission of the alleged offense and is barred by the statute of limitations.

4. That there is a misjoinder of parties defendant in said third count.

As to the said indictment as a whole the said defendant demurs thereto for the reason that there is a misjoinder of counts.

WHEREFORE said defendant prays judgment sustaining said demurrer and that this defendant be relieved from further pleading to said indictment or any count thereof.

DANSON, WILLIAMS & DANSON,
Attorneys for said Defendant.

I, JAS. A. WILLIAMS, one of the attorneys for defendants do hereby certify that the foregoing demurrer is, in my opinion, well founded in point of law:

JAS. A. WILLIAMS.

STATE OF WASHINGTON, }
COUNTY OF SPOKANE. } ss.

JAS. A. WILLIAMS, being first duly sworn, on oath says: That he is one of the attorneys for A. Eugene Wayland, one of the defendants in this action, and that the foregoing demurrer is not interposed for delay.

JAS. A. WILLIAMS.

Subscribed and sworn to before me this 27 day of Feb. 1914.

[Seal]

GEORGE D. LANTZ,

Notary Public for the State of Washington, residing at Spokane.

[Endorsements]: Demurrer. Filed in the U. S. District Court, Eastern Dist. of Washington, March 27th, 1914. Wm. H. Hare, Clerk, Frank C. Nash, Deputy. Received a copy of the within Demurrer at Spokane, Wash., this 28th day of February, 1914. Francis A. Garrecht, Attorney for Plaintiff.

AND AFTERWARDS, to-wit: on Thursday, March 26, 1914, the same being the 149th day of the regular September, 1913, Term of said Court, Present: Honorable FRANK H. RUDKIN, United States District Judge, Presiding, the following proceedings were had in said case, to-wit:

No. 1881.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

RUSSELL G. BELDEN and
A. EUGENE WAYLAND,

Defendants.

Order Overruling Demurrer to Indictment.

Now, on this day, the demurrers of the above named defendants to the indictment herein returned against them by the Grand Jury duly impaneled herein, coming on regularly for hearing, the defendants being personally present in court and accompanied by their attorneys, James A. Williams and Fred Miller, and Francis A. Garrecht, United States Attorney, appearing on behalf of the plaintiff, and, after argument of counsel, the court being fully advised in the premises, it is ORDERED by the court that said demurrers, and each of them, to the said indictment, be, and the same are hereby overruled; to which ruling the defendants except and the exception is allowed.

District Court Journal No. 5 at page 60.

FRANK H. RUDKIN,
Judge.

*In the District Court of the United States, for the
Eastern District of Washington, Northern
Division.*

No. 1881.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

RUSSELL G. BELDEN and
A. EUGENE WAYLAND,

Defendants.

Motion for Separate Trial

Comes now the defendant Russell G. Belden and

moves the court that this defendant be accorded a trial separate from the defendant A. Eugene Wayland, for the reason that by a trial jointly the rights of this defendant cannot be conserved and protected and that evidence which may be introduced as against the said defendant A. Eugene Wayland and which would apply to him alone would tend seriously to prejudice this defendant on a trial of this cause.

This motion is made upon the records and upon the affidavit hereto attached and made a part hereof.

DANSON, WILLIAMS & DANSON,
Attorneys for Defendants.

STATE OF WASHINGTON, }
County of Spokane. } ss.

RUSSELL G. BELDEN, being first duly sworn on oath says: That he is one of the defendants above named and makes this affidavit in support of this defendant's motion for separate trial; that this affiant cannot have a fair and impartial trial if both of the defendants are tried together; that much of the evidence which the Government proposes to introduce and the evidence that will be introduced will relate solely to the action and conduct of the defendant A. Eugene Wayland, and with which this affiant had nothing whatsoever to do; that the introduction of such evidence on the trial of this affiant would tend seriously to prejudice this defendant on his said trial and to prevent this affiant from having a fair trial; that through the trial of the defendants together, the

jury would be confused as to these defendants separately by being compelled to consider the evidence introduced and which would relate to the defendants separately and the jury could not segregate the evidence and apply that which bore only upon this defendant's act and conduct separate from the evidence relating to the acts and conduct of the other defendant.

RUSSELL G. BELDEN.

Subscribed and sworn to before me this 31st day of March, A. D. 1914.

[Seal]

JAS. A. WILLIAMS,

Notary Public in and for the State of Washington,
residing at Spokane, Washington.

[Endorsements]: Motion. Filed in the U. S. District Court, Eastern District of Washington, April 20, 1914. Wm. H. Hare, Clerk. By Frank C. Nash, Deputy. Received a copy of the within Motion at Spokane, Wash., this 20th day of April, 1914. Francis A. Garrecht, Attorney for Plaintiff.

*In the District Court of the United States, for the
Eastern District of Washington, Northern
Division.*

No. 1881.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

RUSSELL G. BELDEN and
A. EUGENE WAYLAND,

Defendants.

Motion for Separate Trial.

Comes now the defendant A. Eugene Wayland and moves the court that this defendant be accorded a trial separate from the defendant Russell G. Belden, for the reason that by a trial jointly the rights of this defendant cannot be conserved and protected and that evidence which may be introduced as against the said defendant Russell G. Belden and which would apply to him alone would tend seriously to prejudice this defendant on a trial of this cause.

This motion is made upon the records and upon the affidavit hereto attached and made a part hereof.

DANSON, WILLIAMS & DANSON,
Attorneys for Defendants.

STATE OF WASHINGTON, }
County of Spokane. } ss.

A. EUGENE WAYLAND, being first duly sworn on oath says: That he is one of the defendants above named and makes this affidavit in support of this defendant's motion for separate trial; that this affiant cannot have a fair and impartial trial if both of the defendants are tried together; that much of the evidence which the Government proposes to introduce and the evidence that will be introduced will relate solely to the action and conduct of the defendant Russell G. Belden, and with which this affiant had nothing whatsoever to do; that the introduction of such evidence on the trial of this affiant would tend seriously to prejudice this defendant on his said trial and to prevent this affiant from having a fair trial;

that through the trial of the defendants together, the jury would be confused as to these defendants separately by being compelled to consider the evidence introduced and which would relate to the defendants separately and the jury could not segregate the evidence and apply that which bore only upon this defendant's act and conduct separate from the evidence relating to the acts and conduct of the other defendant.

A. EUGENE WAYLAND.

Subscribed and sworn to before me this 31st day of March, A. D. 1914.

[Seal]

JAS. A. WILLIAMS,

Notary Public in and for the State of Washington,
residing at Spokane, Washington.

[Endorsements]: Motion. Filed in the U. S. Dist. Court Eastern Dist. of Washington, April 20, 1914. Wm. H. Hare, Clerk. Frank C. Nash, Deputy. Received a copy of the within Motion at Spokane, Wash., this 20th day of April, 1914. Francis A. Garrecht, Attorney for Plaintiff.

AND AFTERWARDS, to-wit: on the 21st day of April, 1914, the same being the 13th day of the regular April, 1914, term of said court, Present: Honorable FRANK H. RUDKIN, United States District Judge for the Eastern District of Washington, presiding, the following proceedings were had in said case, to-wit:

No. 1881.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

RUSSELL G. BELDEN and

A. EUGENE WAYLAND,

Defendants.

Order Denying Motions for Separate Trials.

Now, at this day, the motions of the above named defendants for separate trials in the above entitled cause, coming on regularly for hearing, the defendants being present in court and accompanied by their counsel, James A. Williams and Fred Miller, urging said motions, and Francis A. Garrecht, United States District Attorney, appearing for the plaintiff, resisting said motions, and, after argument of counsel, the court being fully advised in the premises, it is ORDERED by the court that said motions, and each of them, be, and they are hereby, overruled; to which the defendants except and the exception is allowed.

(Signed) FRANK H. RUDKIN,

Judge.

District Court Law Journal No. 5 at page 98.

AND AFTERWARDS, to-wit: on Monday, February 16, 1914, the same being the 126th day of the regular September, 1913, term of said Court, Present: Honorable FRANK H. RUDKIN, United States District Judge, presiding, the following proceedings were had in said case, to-wit:

No. 1881.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

RUSSELL G. BELDEN and

A. EUGENE WAYLAND,

Defendants.

Arraignment.

Now, on this day, in court appeared the above named defendants in their own proper persons and accompanied by their attorneys, James A. Williams and Fred Miller, for arraignment under the indictment heretofore returned against them by the Grand Jury duly impaneled herein; being interrogated by the court as to their true names the said defendants, and each of them, answered that they were the same as alleged in the indictment.

(Signed) FRANK H. RUDKIN,
Judge.

District Court Law Journal No. 5 at page 41.

AND AFTERWARDS, to-wit: on the 21st day of April, 1914, the same being the 13th day of the regular April, 1914, term of said Court, Present: Honorable FRANK H. RUDKIN, United States District Judge, presiding, the following proceedings were had in said case, to-wit:

No. 1881.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

RUSSELL G. BELDEN and

A. EUGENE WAYLAND,

Defendants.

Pleas.

Now, at this day, into open court, come the above named defendants, in their own proper persons, and accompanied by their attorneys, James A. Williams and Fred Miller, for plea to the indictment heretofore returned against them by the Grand Jury duly impaneled herein; thereupon both defendants waived the reading of the indictment, and being interrogated by the court as to their pleas thereto, the said defendants, and each of them answered that they desired to enter their pleas of not guilty thereto, which pleas are received by the court and ordered entered of record on the minutes of the Court.

(Signed) FRANK H. RUDKIN,

Judge.

District Court Law Journal No. 5 at page 98.

*In the District Court of the United States, for the
Eastern District of Washington, Northern
Division.*

No. 1881.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

RUSSELL G. BELDEN and

A. EUGENE WAYLAND,

Defendants.

Verdict.

We, the jury in the above entitled cause, find The Defendant, Russell G. Belden, Guilty as to First Count; Guilty as to Second Count; and Not Guilty as to Third Count, of the Indictment.

Recommending Leniency.

H. L. BLACK,

Foreman.

[Endorsements]: Verdict. Filed May 3rd, 1914.
W. H. Hare, Clerk. By Frank C. Nash, Deputy.
Journal No. 5, p. 109.

*In the District Court of the United States, for the
Eastern District of Washington, Northern
Division.*

No. 1881.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

RUSSELL G. BELDEN and

A. EUGENE WAYLAND,

Defendants.

Verdict.

We, the jury in the above entitled cause, find the Defendant, A. Eugene Wayland, Guilty as to First Count; Guilty as to Second Count; and Not Guilty as to Third Count, of the Indictment.

Recommending Leinency.

H. L. BLACK,
Foreman.

[Endorsements]: Verdict. Filed May 3rd, 1914.
W. H. Hare, Clerk. By Frank C. Nash, Deputy.
Journal No. 5, p. 109.

*In the District Court of the United States, for the
Eastern District of Washington, Northern
Division.*

No. 1881.

UNITED STATES,

Plaintiff,

vs.

R. G. BELDEN and
A. EUGENE WAYLAND,

Defendants.

Motion for New Trial.

Come now the above named defendants R. G. Belden and A. Eugene Wayland and each of them and each move the court to vacate and set aside the verdict of the jury returned herein on the 3rd day of May, 1914, and to grant them a new trial for the following reason, to-wit:

1. Newly discovered evidence material for each

of the defendants which they could not have discovered with reasonable diligence and produced at the trial.

2. Accident and surprise.

3. Error of law occurring at the trial and excepted to by each of the defendants.

4. That the jury received papers, documents and other evidence not allowed or submitted to them by the court.

5. That the verdict is contrary to the law and the evidence.

6. Misconduct of the jury.

7. For the reason that the evidence is insufficient to sustain a verdict.

This motion is based upon the records and files in the above entitled cause, the instructions of the court and upon affidavits to be filed herein.

FRED MILLER,

DANSON, WILLIAMS & DANSON,

Attorneys for Defendants.

Service accepted. Copy received this 5th day of May, 1914. Francis A. Garrecht, U. S. Atty.

[Endorsement]: Motion for New Trial. Filed in the U. S. District Court, Eastern District of Washington, May 5th, 1914. Wm. H. Hare, Clerk. Frank C. Nash, Deputy.

*In the District Court of the United States, for the
Eastern District of Washington, Northern
Division.*

No. 1881.

UNITED STATES,

Plaintiff,

vs.

R. G. BELDEN and

A. EUGENE WAYLAND,

Defendants.

Motion in Arrest of Judgment.

Come now the defendants R. G. Belden and A. Eugene Wayland and each of them and each move the court in arrest of judgment in the above entitled cause for the following reasons, to-wit:

1. That the facts stated in the first count of the indictment do not constitute a crime against the laws of the United States.

2. That the facts stated in the second count of the indictment do not constitute a crime against the laws of the United States.

FRED MILLER,

DANSON, WILLIAMS & DANSON,

Attorneys for Defendants.

Service Accepted. Copy received this 5th day of May, 1914.

FRANCIS A. GARRECHT,

United States Attorney.

[Endorsements]: Motion in Arrest of Judgment.

Filed in the U. S. District Court, Eastern District of Washington, May 5th, 1914. Wm. H. Hare, Clerk. Frank C. Nash, Deputy.

AND AFTERWARDS, to-wit: on Wednesday, June 17, 1914, the same being the 58th day of the regular April, 1914, term of said Court, Present: Honorable FRANK H. RUDKIN, United States District Judge for the Eastern District of Washington, presiding, the following proceedings were had in said case, to-wit:

No. 1881.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

RUSSELL G. BELDEN and

A. EUGENE WAYLAND,

Defendants.

**Order Denying Motion for New Trial and Order
Denying Motion in Arrest of Judgment**

Now, at this day, the motions of the above named defendants for a new trial herein and in arrest of judgment, both, coming on regularly for hearing, the defendants being personally in court and accompanied by their attorneys, James A. Williams, Esquire, and Fred Miller, Esquire, and Francis A. Garrecht, Esq., appearing as attorney for the plaintiff, and, after argument of counsel, the court being fully advised in the premises, it is ORDERED by the Court that both of said motions be, and they are hereby denied; to

which the defendants except and the exceptions are allowed.

(Signed) FRANK H. RUDKIN,
Judge.

District Court Journal No. 5 at page 133.

*In the District Court of the United States, Eastern
District of Washington, Northern Division.*

No. 1881.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

RUSSELL G. BELDEN and

A. EUGENE WAYLAND,

Defendants.

Sentence of Defendent, A. Eugene Wayland.

Now, on this 19th day of June, 1914, into court, comes the above named defendant, A. Eugene Wayland in his own proper person, and accompanied by his attorneys, James A. Williams, Esquire, and Fred Miller, Esquire, for sentence, and being informed by the court of his conviction herein of record on the first and second counts of the indictment returned against him, he is asked by the court if he has any legal cause to show why the judgment of this court should not now be pronounced in his case; he nothing says, save as he before hath said.

WHEREFORE, it is now by the Court CONSIDERED and ADJUDGED, that A. Eugene Wayland,

the said defendant now before the court, be imprisoned in the County Jail of Spokane County, Washington, or in such other prison as may be hereafter provided for the confinement of persons convicted of offenses against the laws of the United States, for the period or Six (6) months, and that said defendant be committed to the custody of the Marshal of the United States for the Eastern District of Washington, who will carry this sentence into execution.

(Signed) FRANK H. RUDKIN,
Judge.

Register of Judgments No. 2, page 236.

*In the District Court of the United States, Eastern
District of Washington, Northern Division.*

No. 1881.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

RUSSELL G. BELDEN and
A. EUGENE WAYLAND,
Defendants.

Sentence of Defendant Russell G. Belden.

Now, on this 19th day of June, 1914, into court, comes the above named defendant, Russell G. Belden, in his own proper person, and accompanied by his attorneys, James A. Williams, Esquire, and Fred Miller, Esquire, for sentence, and being informed by the court of his conviction herein of record on the first and second counts of the indictment returned against

him, he is asked by the court if he has any legal cause to show why the judgment of this court should not now be pronounced in his case; he nothing says, save as he before hath said.

WHEREFORE, it is now by the Court CONSIDERED and ADJUDGED, that Russell G. Belden, the said defendant now before the court, be imprisoned in the United States Penitentiary on McNeal's Island, Washington, or in such other prison as may be hereafter provided for the confinement of persons convicted of offenses against the laws of the United States, for the period of One Year and One Day, and that said defendant be committed to the custody of the Marshal of the United States for the Eastern District of Washington, who will carry this sentence into execution.

(Signed) FRANK H. RUDKIN,
Judge.

Register of Judgments No. 2, page 236.

*In the District Court of the United States, for the
Eastern District of Washington, Northern
Division.*

No. 1881.

UNITED STATES,

Plaintiff,

vs.

R. G. BELDEN and
A. EUGENE WAYLAND,

Defendants.

Order Extending Time to File Bill of Exceptions.

This matter coming on to be heard on the motion of the defendants for an order extending the time within which to file their Bill of Exceptions in the above entitled case sixty (60) days from the 19th day of June, 1914, and the court being fully advised in the premises.

IT IS ORDERED that the time within which to file a Bill of Exceptions may be and it is hereby extended sixty (60) days from the 19th of June, 1914.

Done in open court this 22nd day of June, A. D. 1914.

FRANK H. RUDKIN,
Judge.

[Endorsements]: Order. Filed in the U. S. District Court, Eastern Dist. of Washington, June 22, 1914. Wm. H. Hare, Clerk. Frank C. Nash, Deputy.

*In the District Court of the United States for the
Eastern District of Washington, Northern
Division*

UNITED STATES,

Plaintiff,

vs.

R. G. BELDEN and
A. EUGENE WAYLAND,

Defendants.

Order Extending Time to File Bill of Exceptions.

This matter coming on to be heard on the motion of the defendants for an order extending the time within which to docket the above entitled cause, and file the record thereof in the Circuit Court of Appeals, Ninth Circuit, sixty days (60) in addition to the time allowed by law, and the Court being fully advised in the premises.

IT IS CONSIDERED, ORDERED and ADJUDGED by the court that the defendants be, and they are hereby granted sixty (60) days in addition to the time allowed by law in which to docket the above entitled cause, and file the record thereof in the Circuit Court of Appeals, Ninth Circuit.

Done in open court this 22nd day of June, A. D. 1914.
FRANK H. RUDKIN,
Judge.

[Endorsements]: Order. Filed in the U. S. District Court, Eastern Dist. of Washington, June 25, 1914. W. H. Hare, Clerk. Frank C. Nash, Deputy.

*In the District Court of the United States, for the
Eastern District of Washington, Northern
Division.*

No. 1881.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

RUSSELL G. BELDEN and

A. EUGENE WAYLAND,

Defendants.

Order Extending Time to File Bill of Exceptions.

This matter coming on to be heard on motion of defendants for an order extending the time within which to file their Bill of Exceptions in the above entitled cause, twenty (20) days from the nineteenth (19th) day of August, 1914, and the Court being fully advised in the premises;

IT IS ORDERED, that the time within which to file a Bill of Exceptions be and is hereby extended twenty (20) days from and after the nineteenth day of August, 1914.

Dated this 17 day of August, A. D. 1914.

FRANK H. RUDKIN,
Judge.

[Endorsements]: Order. Filed in the U. S. District Court, Eastern Dist. of Washington, August 20th, 1914. Wm. H. Hare, Clerk. Frank C. Nash, Deputy.

*In the District Court of the United States, for the
Eastern District of Washington, Northern
Division.*

UNITED STATES OF AMERICA,

Plaintiff,

vs.

RUSSELL G. BELDEN and
A. EUGENE WAYLAND,

Defendants.

Order Extending Time to File Bill of Exceptions.

Upon the application of defendants the time of the defendants for preparing, filing and serving a Bill of

Exceptions in the above entitled cause is extended for a period of thirty (30) days from and after the decision upon the defendants' motion for a new trial.

Done in open court this 8 day of May, 1914.

FRANK H. RUDKIN,
Judge.

[Endorsements]: Order Extending Time for Preparing, Filing and Serving Defendants' Bill of Exceptions. Filed in the U. S. District Court, Eastern Dist. of Washington, May 14, 1914. Wm. H. Hare, Clerk. Frank C. Nash, Deputy.

No. 1881.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

RUSSELL G. BELDEN and

A. EUGENE WAYLAND,

Defendants.

BEFORE:

HON. F. H. RUDKIN, Judge Presiding and
a Jury.

APPEARANCES:

For the Plaintiff:

F. A. GARRECHT, ESQ.

For the Defendants:

MESSRS. DANSON, WILLIAMS & DAN-
SON.

MESSRS. ROBERTSON & MILLER.

Bill of Exceptions.

BE IT REMEMBERED, that the above entitled cause came on regularly for hearing in the above entitled court, on March 21st, 1914, at 10:00 o'clock A. M., before the Hon. F. H. Rudkin, Judge Presiding; the plaintiff being represented by its attorney, F. A. Garrecht, Esq., and the defendants appearing in person and by their attorneys, Messrs. Danson, Williams & Danson, and Messrs. Robertson & Miller.

WHEREUPON the following proceedings were had and done, to-wit:

MR. WILLIAMS.—We have interposed a motion on behalf of each of the defendants separately, by affidavits, for separate trials. I apprehend in the trial of this case, if these two defendants would be tried together there would be many complicated questions arise. I also apprehend that the evidence as it goes along could not under any circumstances apply to both of the defendants, and it seems to me this is the time when it should be passed upon. And it seems to me, your honor is bound to say before the case is through that it will be necessary, absolutely necessary, that these cases should be separated and separately tried, and we have made our application for a separate trial by affidavits, showing all of these facts.

THE COURT.—If it were true that the testimony would be offered against one of these defendants which is not competent or material against the other, there would be strong support for your motion, al-

though it is addressed to the discretion of the court. But the government is evidently proceeding upon the theory that each of these co-defendants aided and abetted the other, or that there was a conspiracy between them. On that view of the case, any testimony competent against one would be competent against the other whether they were tried together or tried separately.

MR. WILLIAMS.—Assuming, of course, that it was shown that the other was concerned in that evidence.

THE COURT.—Both cases would have to go to the jury and cannot be determined by the court, so the testimony must necessarily come in. Have the defendants pled?

MR. WILLIAMS.—They have not.

THE COURT.—What say you to the indictment in this case, guilty or not guilty?

BOTH DEFENDANTS.—Not guilty.

WHEREUPON a jury was duly empaneled and sworn to try the case and thereafter Mr. Garrecht made an opening statement on behalf of the Government, thereafter the Government introduced the following testimony:

J. H. HEMPHILL, a witness called and sworn on behalf of the Government, testified on direct examination by Mr. Garrecht as follows:

My name is J. H. Hemphill, and I live in Spokane and have lived here for twelve years. I was not one

of the members or incorporators of the Belden company, but I was one of the incorporators of the International Development Company, the other owners being Mr. Belden and Mr. Wayland.

A certified copy of the articles of incorporation of the Belden Company, admitted without objection as Plaintiff's Exhibit "1".

Q.—Mr. Hemphill, you were a member of the International Development Company, I believe you said?

A.—Yes, and the other two members were Belden and Wayland, the defendants.

After this time the International Development Company became the owners of four claims north of Crows Nest.

I don't remember exactly what they paid for them, but I think the statement which you made to the jury was approximately correct.

MR. GARRECHT.—Now, we want to offer in evidence page 10 of the minute book.

MR. WILLIAMS.—We make the objection this is incompetent, irrelevant and immaterial and not within any of the issues of the case and particularly make the objection on behalf of the defendant Wayland, for the reason that it does not relate to the defendant Wayland at all and has no connection with that defendant.

THE COURT.—The objection will be sustained

as to the defendant Wayland unless he is subsequently connected with it, and the jury will only regard it in so far as the parties are connected with it.

The exhibit admitted in evidence and marked Plaintiff's Exhibit "2," and read to the jury.

(Witness temporarily excused.)

MISS RETHA COVINGTON, a witness called and sworn on behalf of the Government, testified on direct examination by Mr. Garrecht as follows:

I live in Spokane and am a member of the International Development Company. I was not secretary of that company during the year 1911. The stockholders of the company were Mr. Belden and Mr. Wayland and Mr. Williams. The books of the corporation were kept in the office of the corporation. The books of the Empire Coal & Coke Company, the books of the Crown Coal & Coke Company, the books of the International Development Company, and the books of the Empire were kept in the same office, as well as the books of the Michel, as also were the books of the Crows Nest & Northern Railway Company kept in the office. All of these corporations had their place of business or headquarters in the office of the International Development Company; that is, that was their head office. These were also the offices of Mr. Belden and Mr. Wayland. At times Mr. Belden and Mr. Wayland had something to do with managing, controlling, and directing the affairs of these various companies in the office.

On cross-examination Miss Covington testified as follows:

In regard to these offices of these various mining companies and the offices of Belden and Wayland they were segregated in a way. The Crown had their office there and paid their rent and so forth, just the same as though they had a separate office. They paid rent for their share of the office. If I remember correctly the Michel and Empire paid so much a month for the use of the offices. At one time the Crown Company rented the office and paid the bills. Mr. Williams who owned the stock in the International Development Company in 1911 was no more than a formal stockholder, just to qualify as a trustee. The books of these different companies, the Empire and the Crown, and the Michel, were under the control of their board of trustees, as near as it could be. Neither Mr. Belden nor Mr. Wayland exercised any control over these books other than any other trustee or stockholder of these companies. At different times I have been an officer of the Empire and the Crown and the Michel, but never of the railroad company. I was not under salary from them. In performing my work for these companies I did so as a matter of accommodation.

On redirect examination by Mr. Garrecht Miss Covington testified that she was not under salary from these other companies but had always been paid by the International Development Company.

(Witness excused.)

J. H. HEMPHILL, resumed the stand for further direct examination by Mr. Garrecht and testified as follows:

The articles of incorporation of the International Development Company were admitted without objection as PLAINTIFF'S EXHIBIT "3".

MR. GARRECHT.—We want to offer the articles of incorporation of the Michel?

MR. WILLIAMS.—To which offer we object as incompetent, irrelevant, and immaterial, and particularly in so far as the defendant Wayland is concerned, that he was not a party at all to the incorporation.

THE COURT.—The record will be admitted and the effect upon each of the defendants will be determined in the course of the trial, by the charge of the court.

The articles of incorporation of the Michel Company admitted in evidence and marked PLAINTIFF'S EXHIBIT "4".

MR. GARRECHT.—The Government wishes to show by the articles of incorporation of the Michel Coal Mines, Limited, that this company was organized on the 18th of November, A. D. 1905, the incorporators being J. T. Penn, J. H. Hemphill, and R. G. Belden, organized for a capital stock of \$1,500,000.00 divided into 1,500,000 shares.

THE COURT.—It will be admitted for that purpose.

Plaintiff's Exhibits "5" & "6" admitted without objection, and the witness testified that the descriptions therein were those of the two claims offered by the International Development Company to the Michel Company.

The witness further testified that he was a member of the Inland Surety Company, and that he thought that the company was authorized to sell the stock of the Michel Coal Mines.

MR. GARRECHT.—I offer in evidence the partnership agreement of the Inland Surety Company.

MR. WILLIAMS.—We object to it as incompetent, irrelevant, and immaterial and not within any issues in this case and for the further reason that the document offered does not refer to any fact in the indictment and for the further reason it appears from the document offered that it is terminated, the partnership was dissolved on the 6th day of March, 1906, and the statute of limitations has run against anything connected with the Inland Surety Company, and that all matters connected with the Inland Surety Company were ended and determined at that time; and I make the further objection, so far as the defendant Wayland is concerned, for the reason that by the document itself, it appears that Mr. Wayland was not a party in any sense to that concern.

THE COURT.—It will be admitted as against the parties to it.

The defendants except and exception allowed.

The articles of copartnership admitted and marked PLAINTIFF'S EXHIBIT "7".

MR. GARRECHT.—We offer this in evidence.

MR. WILLIAMS.—To which we object as incompetent, irrelevant and immaterial and being between parties not involved in this litigation and referring to a matter in which the defendant Wayland is not in any manner interested, and on whose part we make a special objection; and for the further reason that it is not within any of the issues contained in the indictment, or allegation on which the government is basing this claim; and further and particularly as to the letter appearing on the same page, a letter written by Mr. S. W. O'Brien to Mr. J. H. Hemphill, for the same reason and for the further reason it is between other parties than these defendants.

THE COURT.—Is that letter made a part of the minutes in any way?

MR. GARRECHT.—It is, by the acceptance of the Michel Company.

THE COURT.—It will be admitted subject to the charge of the court as to the effect against the parties.

The document admitted in evidence and marked PLAINTIFF'S EXHIBITS "8" & "9".

The witness testified that at the time the agreement in question was made Mr. Belden, Mr. Wayland, and himself were the owners of all the stock of the International Development Company.

MR. WILLIAMS.—Do you offer the prospectus too?

MR. GARRECHT.—Yes, that is a part of the letter.

MR. GARRECHT.—I wish to offer in evidence a letter dated Spokane, Washington, December 28th, 1905, written on the letterhead of the Inland Surety Company, Fiscal Agent, addressed to J. P. Hoag, Gilbert, Idaho, signed Inland Surety Company, per Wayland.

The witness testified that he could not say definitely whether he wrote the letter or not, but he signed Mr. Wayland's name to it, but that it was not his general custom to sign Wayland's name to letters. He further testified as follows:

I do not know that Mr. Wayland knew that I signed his name to this letter. I was a member of the Inland Surety Company at that time but Mr. Wayland was not. Perhaps he had an interest in it later on, in a round about way. He was not a member of the partnership at that time. He was, however, interested in the International Development Company, in which himself, Mr. Belden and I each held a third interest. The office of the company at that time was in the Peyton Building, that is both the International Development Company and the Inland Surety Company.

MR. GARRECHT.—Q. The partnership agreement that you had to sell the stock of the Michel, that was entered into on or about the 4th or 5th of December, 1905?

A.—December 5th, 1905.

Q.—I will ask you if that is a correct copy of that agreement that was entered into?

A.—Why, I presume it was; it was apparently the date in the document itself.

Q.—Now, at that time was there any agreement between the Inland Surety Company and the International Development Company by which they were to share in the profits derived from this sale?

A.—I don't think there was any evidence of any interest.

MR. GARRECHT.—Q. Who did the commission go to, who got it?

A.—Well, I don't think there was any profit left from these commissions; I don't think there was anything to go to anybody on that.

Q.—Then you haven't any recollection how you came to sign Mr. Wayland's name to that letter?

A.—I have no positive recollection, Mr. Garrecht, no sir.

The letter referred to marked PLAINTIFF'S EXHIBIT "10" for identification.

Q.—You mailed that letter out, did you; it went out through the mails?

A.—I signed the letter for mailing, I don't know as I mailed it.

In reference to a letter marked Plaintiff's Exhibit

"11" for identification the witness testified that he wrote the letter but could not state positively that it was written with the knowledge of Mr. Belden, but he thought every one in the office knew about it, and that Mr. Belden and Mr. Wayland were connected with the office.

I think I had a talk with Mr. Belden and Mr. Wayland about the Michel Coal Mines company purchasing these two additional claims that were staked in the name of E. A. Martin and E. H. LaFrance. I think the understanding that we arrived at among ourselves about any others we were to make the Michel Company as outlined in that letter. I think that was the conclusion, but I would not say absolutely that this letter was written as a result of the conversation and conclusion reached by myself, Mr. Belden and Mr. Wayland with reference to these claims. There may not have been both of these present, or they may both have been there. I don't know. I don't remember whether I talked it over with each of the others separately. I do not remember positively of talking it over with either one of them, but I am quite positive I would not have sent out a letter of that kind without having done so, because it is quite an important letter, and I don't think I would have taken action without consulting my partners on it.

MR. GARRECHT.—Q. Did you ever send out a letter of such an important nature without first having had the consent of the parties interested?

A.—I don't think so.

MR. GARRECHT.—Q. I will ask you if you would have sent out such a letter as this without having consulted all the parties in interest.

A.—Yes, I might have sent out the letter without consulting both parties. It was a stock company and I would feel justified if two of the partners or two of the holders of an equal amount of stock would sanction it. (Noon recess.)

Page 11 of the Michel Coal Mines Limited minute book admitted in evidence without objection and not marked as an exhibit, but read into the record.

MR. GARRECHT.—I wish to offer in evidence from page 20 of the minute book of the Michel Coal Mines Limited here, a special meeting, May 15th, 1906.

(Exhibit "12" admitted.)

MR. GARRECHT.—This is one that has been read. I will ask the stenographer to mark this.

MR. WILLIAMS.—Yes.

PLAINTIFF'S EXHIBIT "13" marked by the stenographer.

PLAINTIFF'S EXHIBIT "14" admitted without objection.

I believe the Michel Coal Mines paid the \$2,500.00 for these claims.

The International Development Company afterwards became the fiscal agent for the Michel Company.

(Page 37 of the Michel Coal Mines, Limited, minute book, admitted in evidence and marked PLAINTIFF'S EXHIBIT "15".

(Exhibits 16 to 22 inclusive were identified by the witness.)

(Witness excused.)

S. W. O'BRIEN, a witness called and sworn on behalf of the Government, testified on direct examination by Mr. Garrecht, as follows:

My name is S. W. O'Brien, and I live in Spokane and have lived here since 1899. I think in the early part of December, 1909, I was a member of the Inland Surety Company, and after refreshing my memory from plaintiff's exhibit "7", I recognize my signature to the document and I have had it in my possession since December, 1909. I am sure that this pamphlet, a prospectus of the Michel Coal Mines, Limited, was turned out by a printing shop of which I was the proprietor during the time I was a member of this partnership. I came to print it because I was given the copy. The copy was given to me from an office in the Peyton Block which was occupied by Mr. Hemphill, Mr. Belden and Mr. Wayland. After that time I had the copy set and printed it in that form, printed it in my establishment. I caused the booklet to be delivered. During the time I was a member of the Inland Surety Company I was in the offices in the Peyton Building occupied by Messrs. Belden and Wayland quite a few times, mostly in connection with orders of printing of this nature. I

think the Inland Surety Company's business office was also in their office, in that building. I think after these were printed I saw some of the copies there in their office.

THE COURT.—The question is whether you have any recollection of the case or not?

A.—The order—the usual routine of the printing order was to receive the copy, perform the work and make a charge against a certain party, and I always expected to find them in the same place when I went after my money, and presumably the boy had delivered the goods in this case. The order was received from that office and the charge was made against that office, and I never heard any “kick” that they hadn't got the goods.

I have no distinct personal recollection of seeing a copy of this prospectus in that office that I can remember. I had no business seeing it there.

MR. GARRECHT.—Q. Who paid you for printing it?

A.—The printing of these prospectuses was a part of my consideration of the partnership in the Inland Surety Company, I was to supply certain printing.

Q.—You were a member of the Inland Surety Company about three months?

A.—Yes, sir.

Q.—Now, at the time of the dissolution was anything given to you in consideration for the printing

that you had done, upon the dissolution of the company?

A. Not for the printing. I wasn't paid for printing; I received some money, but not for printing.

Q.—Well, what did you get the money for?

A.—The money was given to me in consideration of my turning back some stock which had been given me at the time I became a member of the Inland Surety Company.

Q.—And who paid you for the stock?

A.—The stock, as I understand it, was given to me as a bonus.

MR. WILLIAMS.—Isn't there a writing covering that stock so we won't have to guess at it?

MR. GARRECHT.—Not that I know of. I offer at this time in evidence the articles of agreement and contract between the International Development Company and S. W. O'Brien.

MR. WILLIAMS.—I object to it as not being material.

THE COURT.—It will be admitted.

Defendants except and exception allowed.

Plaintiff's Exhibit "23" admitted.

PLAINTIFF'S EXHIBIT "24" for identification marked by the reporter.

MR. GARRECHT.—Q. I now hand you plaint-

iff's exhibit for identification No. 24 and ask you if you had this printed?

A.—Well, nine years is a long time. I have seen this before and it is the work of my shop, in all probability. There is no identification mark on this slip of paper by which any one could identify who printed it. I printed in my place similar slips of paper, and these were printed in my shop; whether this is one of the number or not I will not swear, I could duplicate this now by photographic process. I printed slips similar to this during the life of my connection with the Inland Surety Company.

MR. GARRECHT.—Q. Well, was it in pursuance to your contract with the Inland Surety Company?

A.—Yes sir; similar slips of paper to these were printed, and they were printed as a part of my agreement to furnish printing for the Inland Surety Company.

On cross-examination the witness testified as follows: The copy from which this was printed was not brought to my office and I do not have any personal recollection of the individual from whom I got it.

On redirect examination he testified as follows: I know that I got it from the office of the Inland Surety Company.

(Witness excused.)

J. S. HOGUE, a witness called and sworn on behalf of the Government, testified on direct examination by Mr. Garrecht as follows:

My name is J. S. Hogue, and I live at Orofino. I purchased stock in the Michel Coal Mines, Limited, but I do not quite remmbeer how I first heard about the company, whether I received a letter or whether I read in some paper about it. I don't remember just how I got the first information.

I haven't any recollection about it, independent of the letter. I remember having received that letter and others. I cannot say as to this prospectus having been attached to the letter at the time I received it. I remember receiving it and reading it about that time. It has been quite a number of years ago. I received it through the mail.

Q.—Both the letter and prospectus were attached together?

A.—I don't remember about that being attached but I received a prospectus and that letter by mail. After the receipt of this letter I attended a meeting of the Michel Coal Company. I think both of the defendants were present, if I remember right. I am quite sure Mr. Belden was. They spoke to me about the Michel property and if I remember I asked them about the proposition the condition of things there. This was after I made my investment.

I cannot say positively whether both the defendants were present, but I think they were. I had the talk

with Mr. Belden. The time of this meeting was about the 1st of June but I don't remember what year. I can't say for sure whether it was after the receipt of the letter but it was after I had purchased, and perhaps the first stockholders' meeting. I kept no dates or anything of that kind, and I wouldn't be positive what year it was, but it was in June, the first of June, that I was present at a stockholders' meeting. I asked him about the proposition and he informed me that it was a good proposition and thought it would be a paying proposition and would like me to take another block of stock, something to that effect if I remember—as near as I remember it, was the course of our conversation.

I think he said the property was undeveloped but they were preparing to start out a crew of men pretty soon, something of that kind, to develop it, prospect it. He told me they had discovered coal on the property and showed me some of it either at that time or a time near that date, when I passed through the city, I called and got a piece of coal, and he told me that they came from the Michel Coal mine, took a small piece, perhaps the size of a hen's egg or smaller. He said something about the railroad, but I don't remember what the conversation was exactly, or whether that was in a letter that he wrote me; I am not sure which it was now, either a letter or—I was assured—I am not sure it was in a conversation. I talked with him later than that but I don't remember who was present if anybody. It was a time that I passed through the city going east, and I came to his office and had a talk

with him. I was talking with Mr. Belden at that time and he gave me some literature concerning the survey of the country, the Crows Nest country, and then told me about the railroad, prospective railroad, and gave me a piece of coal. I think that all happened at the same time, at the time I passed through the city. He said in relation to the Michel that he thought it would be a good thing or was a good thing, or was going to be a good thing; something to that effect.

MR. GARRECHT.—I now show you a letter written on the stationery of the Inland Surety Company dated Spokane, Washington, December 18th, 1905, addressed, Mr. J. S. Hogue, Gilbert, Idaho. Did you receive that letter?

A.—Yes sir.

Q.—Through the mail?

A.—Yes sir.

WHEREUPON an adjournment was taken until 10:00 o'clock A. M., March 23rd, 1914.

MISS RETHA COVINGTON, recalled, on direct examination by Mr. Garrecht, testified as follows:

MR. GARRECHT.—We want to offer in evidence the books of the International Development Company that were identified by Mr. Hemphill, all of them.

MR. WILLIAMS.—Well, of course, we object to the offer in bulk, these books, anything material should be offered separately.

THE COURT.—The books are admissible in evi-

dence. How much of them have any bearing on this case I cannot tell at this time. I presume the government will hereafter direct specific attention to the part that they desire to offer.

MR. WILLIAMS.—Of course, going in under an offer like this, it seems that the whole thing is before the jury and we object to it.

THE COURT.—I presume the particular parts that the government relies upon will be designated, and there is no reason why the other part should be received in evidence. I will see that nothing improper goes before the jury and when they retire we can segregate the matters, if it becomes necessary to make up a record in the case.

Defendants except and exception allowed.

THE COURT.—They will be admitted subject to the designation of the plaintiff; they may go before the jury.

MR. WILLIAMS.—And I assume that the admission of these books at this time in that way implies a ruling of your honor upon any material matter that may be there?

THE COURT.—No, you can object to any particular part of them as we go along.

EXHIBITS 17, 18, 19, 20, 21 & 22 admitted in evidence.

I stated yesterday that I was secretary for the International Development Company, and as such I

have charge of their correspondence, and I was also the stenographer in the office. As to the letters that were sent out, sometimes they were dictated and sometimes I wrote them of my own accord. The only way of distinguishing between those that were dictated and those that I wrote myself is the fact that sometimes I put my initials down in the corner and sometimes I didn't. My practice when they were dictated to me, was to always use my initials, and I did not use any other initials except my own. Of late years I have used the initials of the persons who dictated the letter to me, but when I was first in the office they did not follow that custom. However, later on they did. Then they used the initials of the person writing the letter and the stenographer. Copies of the letters that were written and sent out were made and kept in the files of the company. The package of files you now hand me is the package I handed to you the other day in the hall. I got this package of letters out of the files of the companies. The letter which you now show me, dated February 26th, 1906, was kept among the files of the company.

EXHIBITS 26, 27, 28, 29, 30, & 31, marked for identification.

(The correspondence making up exhibit 32 for identification was identified by the witness.)

(Pamphlets similar to this pamphlet marked Plaintiff's exhibit 31 were sent out of the office of Messrs. Belden & Wayland.)

MR. GARRECHT.—Q. Miss Covington did you ever mail any of these pamphlets out?

A.—I don't remember. I hardly think I did.

Q.—Were you bookkeeper for any of these companies at any time prior to January of this year?

A.—No sir.

Q.—Never made any entries on the books?

A.—Well, I might, yes, sir. I did work a little on the books of the International Development Company from March of 1912.

Q.—Were the books of the other corporations kept in the office here in Spokane?

A.—In their offices?

Q.—Yes, in their offices?

A.—What company are you referring to?

Q.—Well, the International Development Company?

A. Well, they had their own offices. It was all in one suite however. They kept within their own office, each company was there in the office, as well as the office of the International Development Company.

Q.—But they were all there in one room?

A.—One suite.

Q.—Were you ever an officer in any of these corporations, assistant secretary?

A.—Yes sir. I identify this book as the ledger of the International Development Company and as one of the books having been kept in the office.

MR. GARRECHT.—I now offer the book in evidence.

MR. MILLER.—That is I presume the offer will be under the same arrangement as the others?

THE COURT.—Yes. Of course there may be something in there that is competent and something that is not. We will pass upon that.

PLAINTIFF'S EXHIBIT "33" admitted.

Upon admission of counsel various books of record were admitted in evidence and marked PLAINTIFF'S EXHIBITS "34" to "68" inclusive, the admission in all cases being that they were the books and records as shown upon their face to be.

MR. GARRECHT.—Q. Miss Covington, you stated that in later years you used the initials of the person who dictated the letter to you besides your own on your letters. What was the method prevailing before that time, by you?

A. Why, it seemed when they first started in business they were using the initials of the company, whatever it happened to be, with the stenographer's initials.

Q.—I show you a letter which is marked for identification "29" and ask you to state to the jury

what the letters indicate on the lower left hand corner here. Give them all first and then what they indicate?

A.—I. S. C. and R. C., "Inland Surety Company" and my initials, "Retha Covington."

On cross examination by Mr. Williams, the witness testified as follows:

I have no method of identifying these papers which I say came from the office of the International Development Company, except that I took them from the files myself. I took them out at the time the grand jury met but I don't remember the date. Previous to that time these files had not been taken from the office by Mr. House, the government inspector. These were not part of the papers he took out under receipt, but it is a fact that Mr. House for eight or nine months had the privileges of that office, going through the files and certain letters and documents were taken out by him. These files which I say I took down to the grand jury were returned to the files of the International Development Company about a month ago. I called Mr. House up and asked him for them. I couldn't state the exact date however. As to these documents here which I have referred to that I took down in January, I have no knowledge as to all of them having been taken down by me at that time. There are, however, some of them that I can remember.

MR. WILLIAMS.—Q. For instance, take identification number 25. What I want to get at is this: have you any independent recollection as to all of

these documents being attached and being a part that you turned over in January?

A.—I have not. These were taken out in bulk and I couldn't identify any of them separately.

I did not check them at the time they were taken nor did I retain copies of them at that time. I was called before the grand jury that morning and asked to bring them down and I had no chance to make copies.

MR. WILLIAMS.—What I am getting at is this, and that is all: You don't undertake to say that you have any independent recollection of all of these documents?

A.—I have not.

Q.—But you do know that you delivered into the government's possession certain files?

A.—Yes, sir.

Q.—And later Mr. House returned you some files that were claimed to be the ones that you had turned over to him?

A.—Yes, sir.

(Witness excused.)

F. L. FERRELL, a witness called and sworn on behalf of the Government, testified on direct examination by Mr. Garrecht as follows:

My name is F. L. Ferrell and I live in Milwaukee, Wisconsin, and have lived there for thirteen years.

I am engaged in the grain business. I am acquainted with the signature of the letter which you hand me, and it is the signature of A. E. Wayland. I received that letter through the mails.

MR. GARRECHT.—I now offer the letter in evidence.

MR. WILLIAMS.—I object to it as immaterial.

THE COURT.—Objection overruled.

Defendants except and exception allowed.

PLAINTIFF'S EXHIBIT "69" admitted.

MR. GARRECHT.—That is all.

CROSS EXAMINATION.

On request of counsel for the defendant, a letter from the witness admitted in evidence and marked DEFENDANT'S EXHIBIT "70".

MR. GARRECHT.—You admit that that was sent through the mails, do you?

MR. WILLIAMS.—I don't know anything about it but I admit that is Mr. Wayland's answer.

(Witness excused.)

J. S. HOGUE, recalled, testified on direct examination by Mr. Garrecht as follows:

PLAINTIFF'S EXHIBIT "71" identified by the witness and admitted without objection in evidence.

CROSS EXAMINATION.

On cross examination by Mr. Williams, he testified as follows:

My business at present is real estate and fire insurance. Sometime after the year 1905 I talked with Mr. Belden concerning these properties, particularly the Michel. Mr. Belden stated that he thought it was good property and he told me it was the intention of the company to put a crew of men to work prospecting the property to ascertain the possibilities of the claims. In the Michel Coal Mines Limited I may have been an officer later on, but I don't remember, but I was present at one meeting of the stockholders and it was either at that meeting or at a later time when I passed through the city that I heard Mr. Belden say something about the properties. I don't remember which time it was. He said that there had been some coal found. I think that was the later time, the time I passed through the city going East. I could not give the exact date but I think it was on my way to St. Louis to the Exposition. I am not sure. The time I attended the meeting was in January. At that meeting certain reports were read concerning this property.

MR. WILLIAMS.—Q. Now, look a minute and see if you recognize that—I direct your attention now to the minutes of that meeting showing your presence and reference there to certain letters read and that certain letters, right here under the same date, January 21st, 1907—look at that letter, the

one of January 21st, 1907, and state if you recall that being the letter read?

A.—Well, I remember that there was something, a letter of that nature read, but I could not state as to that being the identical letter. There were reports made, and made favorable. I do not recall whether a report was submitted by the secretary. I do however remember a letter bearing date of January 12th, 1907, having been read, being a letter from Mr. Hemphill. While I cannot recall distinctly in regard to the letter of January 21st, 1907, having been read, I rather think it was either read or something, I can't remember—but I remember something. Mr. Belden may have told me these things. I don't remember; but I remember this one.

DEFENDANT'S EXHIBIT "72" for identification marked by the stenographer. DEFENDANTS' EXHIBITS "72" and "73" admitted in evidence without objection.

MR. WILLIAMS.—Q. Now, Mr. Hogue, having your attention refreshed by this letter what would you say as to the contents of this letter being substantially what you were told?

A.—I think that I remember and if I recollect, I heard that letter read or most of it at least. I remember the part of the letter that refers to the office, and also I remember about the horses and the preparation for work; I remember that.

Q.—And what would you say now as to that being a statement of what you heard at that meeting?

A.—That is where I got it instead of from the individual but I can't remember quite whether I received it verbally or whether I heard the report read.

Q.—Now, having your recollection refreshed, I believe you state you were not told this by Mr. Belden but that you got it from reading this letter?

A.—Yes, unless he repeated it at my second coming. We had a personal talk; that I remember.

I had some property listed now and I have sold real estate on a commission basis at Orofino. I was requested by either Mr. Belden or Mr. Wayland to visit this property and see it for myself. I don't remember their having repeated this request, but I remember them asking or referring to visiting the property. Mr. Belden gave me a piece of coal at some time, either one of the two times, either at the meeting or when I saw him at Spokane, and had the talk; I don't remember which one but it was on one of these occasions at Spokane. This being quite a long time ago my memory is not distinct as to the dates, but I am quite positive that he gave me the coal here at Spokane. After refreshing my recollection from a letter bearing date of May 3rd, 1907, which was written to me, I am still of the opinion that I received a piece of coal in Spokane. I do not remember having received a piece at the Fair, but I suppose I did; but I received a piece here. I cannot state the time that I received this coal. I could not even state

the year. I do not recall having received two different pieces of coal at two different times.

DEFENDANTS' EXHIBIT "74" identified by the witness and admitted in evidence.

(Witness excused.)

(Noon recess.)

R. B. GROVE, a witness called and sworn on behalf of the Government, testified on direct examination by Mr. Garrecht as follows:

My name is R. B. Grove; my age is thirty-three; I live at Hillyard, Washington, and am engaged in the hardware and furniture business. I have lived in Hillyard about eight years. The letter which you show me was received by me from the post office at Hillyard with the newspaper clipping attached to it.

MR. GARRECHT.—I offer it for identification.

Letter marked PLAINTIFF'S EXHIBIT "85" for identification.

MR. GARRECHT.—Q. I will ask you, Mr. Grove, if at any time you were the owner of shares of Michel stock?

A.—Yes, sir.

Q.—Did you make any payments on your Michel stock?

A.—I did.

MR. GARRECHT.—Q. To whom did you make the payments?

MR. WILLIAMS.—That same objection; it is immaterial.

THE COURT.—I don't know what it is leading up to. Overruled.

Defendants except and exception allowed.

A.—I made the first payment to Mr. Demorest.

Q.—Did you make any to Mr. R. G. Belden?

A.—I made one of them at least to Mr. Belden. I received a receipt for the amount that I paid Mr. Belden, but I cannot say positively whether this is the one or the other payment. I made two payments after that first one. One of them I know was to Mr. Belden and the other one I rather think was to the stenographer.

(Witness excused.)

F.W. BOYD, a witness called and sworn on behalf of the Government, testified on direct examination by Mr. Garrecht, as follows:

My name is F. W. Boyd, and I live nine miles northeast of Palouse City, in the neighborhood of Frese, Idaho. I am a farmer. At one time I became the owner of the stock in the Michel Coal Mines, Limited. Before investing I received letters through the mails. The letter which you hand me I received through the mails.

PLAINTIFF'S EXHIBIT "76" admitted.

I remember receiving plaintiff's exhibit "70" through the mails likewise with the rest of it.

CROSS EXAMINATION.

by Mr. Williams he testified as follows:

I acquired my stock in the spring of 1906 or 7, I don't know just exactly when. It was one of the two springs, 1907 as a matter of fact. The letter that has been referred to was a letter in February, 1906.

On redirect examination the witness testified as follows: I have never seen either of the defendants and have never spoken to them.

(Witness excused.)

CHARLES HILL, a witness called and sworn on behalf of the Government, testified on direct examination by Mr. Garrecht, as follows:

My name is Charles Hill and I reside at Hartline, Washington. I am a laborer at present. At one time I had stock in the Michel Coal Mines Limited, which I purchased from Mr. Belden, with whom I had a personal talk in regard to it. I don't remember when this conversation took place but it was about seven years ago I think. He said the property was mountainous and that they had found coal on the property; said they prospected around several different places and found coal in three or four places; said they had made cat holes in several different places and none of them over six feet deep, he thought, and they had found coal in several of these places and there was another place in the bed of the creek where a vein six feet—he said he didn't know how thick the vein was, but they could see six feet of it and didn't know

whether that was—whether it was any thicker than that, but they could see six feet of the vein, a water fall where the water run over the coal. I asked him how soon he thought it would pay dividends and he said he couldn't tell.

And he said he couldn't tell exactly; that as near as he could tell it would probably be about a year.

MR. GARRECHT.—Q. Did he make any representations, in event you were dissatisfied, what he would do.

MR. WILLIAMS.—I object to that; that is not within the indictment in any way, not within any allegation there nor would it be material on any matter.

THE COURT.—I think perhaps it is a circumstance. He may answer that.

Defendants except and exception allowed.

A.—I told him that if he would give me a written guarantee that he would return the money inside of a year that I would take five hundred dollars worth of the stock; and he gave me a written guarantee that he would return it to me inside of the year if I called for it. I called for it in nine months. I called for the money, wrote to him and asked him to return the money.

MR. GARRECHT.—Did you see him personally?

A.—Not at the time I didn't see him. I wrote to him and I saw him when I bought the property, but

he said he didn't have the money; that he couldn't return it.

On cross examination by Mr. Williams he testified as follows:

I resided in Hartline at that time and I was postmaster there. I did not at that time talk with any other person about buying this coal stock. I purchased at the time he was there; before he left. All of these things that I say occurred took place in one conversation at the time I bought the stock and there was nobody else present except he and I. We were in the post office. I was talking with Mr. Belden and we two were talking alone. The writing which I refer to was destroyed. I was burnt out and lost everything except what was in the safe and when I resigned I looked through all the papers I had and destroyed those that I thought was of no further value, and that was among those destroyed. I do not remember the exact date of this writing, but I think it was 1906 when he was down there as near as I remember. I can't say positively, neither can I tell the month. It seems to me it was in the spring, early spring of the year, but I am not sure though. I cannot say now what time of the day it was that we had our talk, and I have no recollection on the subject nearer than what I have said. Mr. Belden did not say how much coal was in the holes which he dug; he said he just scratched down to the top of the coal; found coal in different places, two or three of the places and he didn't say—said he couldn't tell; just struck coal. He did not say whether it was in a vein or not. He just simply said he found

coal, except the one that was in the bed of the creek. I said that he said there was a vein of six feet in the bed of the creek where there was a water fall. He didn't say whether it was any thicker than that or not but he could see six feet of it; he didn't know whether the vein was any thicker or not. As to the length of the vein, if I remember right, he said the creek was about a rod wide; I couldn't say positively; I think that is what he said, and one end of the water fall where they could see the vein for six feet. In regard to prospecting he said nothing more than they had scratched around on it a little bit. He did not say he had sunk down on it at all, nor did he say anything in regard to the depth of the vein. I did not ask anything about it. He did not tell me for what distance the vein showed neither did I ask him, any more than what I have said. I did not keep a copy of the letter which I wrote to Mr. Belden but I think it was written about the ninth month after I bought the stock as near as I can tell. I am not positive but I think it was about nine months after I bought the stock. I know it was inside of the year after he gave it to me. I did not remember the first word of the paper which he gave me; I do not remember the paper particularly except it had the word "guarantee" in it, to return the five hundred dollars to me within a year if I called for the money; if I was not satisfied with the property and called for my money; something like that; something to that effect, but I do not remember the exact language. I don't remember that there was anything said to me about going up to visit the property and I did not

talk with him as to whether I was going up to visit it. He never said anything to me about it, but I heard him talking to others in the post office, said that they were arranging, if I remember right, for several of the people around Hartline to go up and see the property, but nothing said to me personally. I heard the conversation and knew that Mr. Belden was trying to get the people to go up there personally and view the property. I did not know as it applied to me; I didn't know as it did. I did not go up to see the property and know nothing about it personally, except what may have been told me. I know positively that the word "guarantee" was used in the writing that he gave me; at least the substance of it was as I said that he guaranteed to return my money inside of a year if I was not satisfied with the property or called for the money back. I received no letters from the Michel Coal Mines Limited except the yearly reports. I told Mr. Belden when I bought the property that I would like to have a copy of the corporation laws of the state and he said he thought they had some in the office and he would send them to me. He sent a few papers, duplicates like, regarding corporations, but nothing of the law particularly. I can produce none of the letters I received from the Michel Coal Mines Limited as everything was destroyed. Mr. Belden signed the agreement that I say was given to me by him. I don't remember whether he put the name of the corporation down or not; I couldn't say as to that. I know his name was on it. Further than that I cannot

say how the document was signed; I can't remember anything about it.

MR. WILLIAMS.—Q. And isn't it a fact also, Mr. Hill, that what your arrangement was, it was an arrangement with the Michel Coal Mines Limited giving you the privilege of disposing of some of your stock in case you desired?

A.— Yes, sir.

Q.—That is the—

A.—I think—yes, I think that there was something said about that too.

Q.—Look at this letter that I hand you and state if you received the original of that letter?

A.—I can't read; my eyes are not very good. Will you read it please.

(Counsel reads letter to the witness.)

A.—It seems to me I received a letter regarding the matter, I am not positive now.

Q.—Do you recognize that language as being the language contained in a letter that you received?

A.—No, sir, I don't remember it at present.

Q.—Can't tell anything about it?

A.—I have forgotten all about it. I know there was something said about it though, whether it was when he was down there when I bought the stock or whether it was afterwards when I saw him in the office, I can't say.

Q.—Isn't it a fact that the arrangement you made with Mr. Belden is the one that is stated in that letter which I have just read to you?

A.—If I received a letter from him at all it was something to that effect but I can't say positively now.

Q.—Well, will you say that this was not the arrangement?

A.—No, I wouldn't.

MR. WILLIAMS.—Now, if that is the fact, I move to strike his evidence. Now, he says that he will not say that this was the arrangement as stated in his letter.

THE COURT.—The weight of the testimony is for the jury.

Defendants except and exception allowed.

MR. WILLIAMS.—Q. I will ask again: Will you say that you did not receive the original of that letter that I just read to you?

A.—I wouldn't say that I didn't receive the original of it. I don't remember whether I did or not.

The letter read to the witness marked DEFENDANTS' EXHIBIT "77" for identification.

When I made this purchase I received what I supposed they call advance certificates. In reference to advance certificates 36 & 39, as I said before, I do not remember the exact date I received them, I cannot positively remember the year but it was somewhere

around February 12th, 1906. I did not get these certificates on the day that I talked with Mr. Belden, but did receive them several days later. If the advance certificates were issued in regular order on February 12th I would say that my talk with Belden was several days before February 12th. Within nine months or thereabouts I made the demand for the payment of this money. I recognize the signature to the letter which you hand me as my own signature and I must have written it on or about the date it bears, December 20th, 1906. In that letter I was referring to this investment in the Michel Coal Mines Limited and wrote the certificate in.

DEFENDANTS' EXHIBIT "78" admitted without objection.

MR. WILLIAMS—Q. Now, how did it happen, Mr. Hill, that if you demanded the return of your money within about nine months as you say, that you were writing such a letter as this down in December?

A.—I was dissatisfied with the property; I had lost confidence in it.

Q.—How does it happen that you did not demand the return of your money in this letter if you had such an arrangement?

A.—I can't say. I know that I requested the return of the money inside of a year; that is not a year after the stock was bought.

Q.—I understand, but I am talking about your testi-

mony before when you said it was within the nine months?

A.—I said as near as I could remember it was about nine months, but it was inside of a year I know positively.

Q.—How do you fix it within a year?

A.—I couldn't say. I know at that time I looked at the guarantee before I sent them money and I know at the time when I bought the stock but I don't remember just as to the time now that I requested the return of it; before the year was up.

Q.—And you would not say that the language of that agreement that you had was not as shown in that letter that I read to you a moment ago?

A.—No, sir.

Q.—You say that you had lost confidence in the company within the year's time? That is the reason then that all happened?

A.—Yes, sir.

Q.—And you didn't have anything more to do with their stock?

A.—No, sir. I think at that time that I afterwards sold the stock to Mr. Albough but I don't remember how long it was after I bought the shares, but I know it was more than a year after I bought the stock.

Q.—Before you sold the stock to Albough?

A.—Yes, sir.

I received the letter which you show me along about March 10th or 11th, 1907, signed by Mr. Belden. I don't remember anything about that. I do not remember the letter sufficiently to identify it.

The letter marked DEFENDANTS' EXHIBIT "79" for identification.

MR. WILLIAMS.—Q. Isn't it a fact that about March 9th, 1907, you were trying to trade or talking about trading for more stock in this Michel Company, about trading for that stock a contract that you had in the Washington Home Company?

A.—Might possibly be; I can't say that I didn't. I know they boosted the stock and claimed it was a very good property and I might have changed my mind and later on—

Q.—(Interrupting) But you say prior to that time, prior to March 9th or 10th, you had lost confidence in it and didn't want any of the stock?

A.—Yes, sir.

Q.—And that you say you might have talked with them about trading afterwards?

A.—Yes, sir.

(Witness excused.)

C. L. BUTTERFIELD, a witness called and sworn on behalf of the Government, testified on direct examination by Mr. Garrecht, as follows:

My name is Charles L. Butterfield and I live at

Moscow, Idaho, and have lived there for about twelve years. I am a dealer in agricultural implements. At one time I was an investor in the Michel Coal Mines Limited. I am now under the impression that I became a member of the company in 1906. I took an active interest in the affairs of the company.

MR. GARRECHT.—Q. Do you know who had the management of the affairs of the company during that time?

A.—Do I know, yes.

Q.—State who did have at that time?

MR. WILLIAMS.—May I ask one question: Did the minute book show the dealing with reference to management?

A.—Without question the Board of Directors had the management.

MR. GARRECHT.—Q. Who was the president?

A.—I was president of the company a portion of the time.

MR. GARRECHT.—Q. During the time that you were president of the company did they have a manager of the corporation that directed its affairs?

I am under the impression that they had; that there was a man that was called manager—I don't think there was a man that was called manager. My memory is not very clear on that.

Q.—They didn't have any one that the record would show as a manager?

A.—The books will show; I am not clear on that now.

Q.—Well, would the books show that?

A.—The books would show whether there was such an official, so designated.

Q.—I am not asking you that; I am asking you if any individual had the actual control and management of the property regardless of what the book show?

A.—Why, yes; yes, they did.

Q.—Who had charge of that work?

A.—Why, R. G. Belden and A. E. Wayland, mainly.

The letter which you hand me presumably came through the mail—it must have come through the mails; I don't know how it could have gotten to me in any other way.

MR. GARRECHT.—Q. Can't you state yes or no whether you got that through the mails?

A.—I would say yes.

PLAINTIFF'S EXHIBIT "80" admitted in evidence without objection.

On cross examination by Mr. Williams he testified as follows:

The trustees of the company during the year 1905 will be shown by the records of the company but I have no doubt it is a fact that they were J. T. Penn,

R. G. Belden, C. L. Butterfield, J. H. Hemphill, P. S. Byrne, and E. L. Harvey. If they were, it was of short duration. I think in the year 1906 the trustees were J. H. Hemphill, William Hall, C. L. Butterfield, R. G. Belden, J. T. Penn, and R. Covington, the C. L. Butterfield being myself.

(Whereupon Mr. Williams read into the record the names of the officers serving during the first year.)

MR. GARRECHT.—If it is agreeable we will prepare a list of all the officers of these corporations and submit them to you to be checked over.

MR. WILLIAMS.—I suppose it will save some time.

Q.—Now, when you speak of R. G. Belden and A. E. Wayland being the managers of these companies, on what do you base your statement, Mr. Butterfield?

A.—Why, on my personal observation.

Q.—Were they ever elected, so far as you know, managers of these companies?

A.—Why, they were elected as directors, and a director is in a way a manager, is he not?

Q.—Then you were in a way a manager?

A.—While I was a director.

Q.—That is what you mean when you say Belden and Wayland were managers, is that they were directors?

A.—That is partially but not wholly it.

Q.—Well, Wayland was not a director during the year 1905 or the year 1906, so in what way do you say he was a manager, Mr. Butterfield?

A.—Well, the business of the company was merely attended to from their office.

Q.—You had the contract with them that has been entered into, appears of record, that is this contract with the Inland Surety Company, is that what you mean?

A.—Why, they were the active men in the coal proposition in the Michel Coal Mines. They were the active men; that is they knew the details, and they mapped out the line of work as a general thing.

I sold some stock of the Michel Company on commission, but I sold very little of it, and received my commissions on what I did sell.

MR. WILLIAMS.—Q. And in that respect you acted just the same as they did whenever you did sell stock?

A.—I can't answer that question, whether I acted as they did when I sold stock, because I don't know how they acted.

Q. I understand, but what I mean is your authority was the same in selling stock, and you sold it?

A.—Why, I supposed it was; I supposed my authority was the same.

(Witness excused.)

WILLIAM S. HART, a witness called and sworn on behalf of the Government, testified on direct examination by Mr. Garrecht as follows:

My name is William S. Hart, and I have lived in Hartline, Washington, since 1889, that is in Hartline and in that vicinity. I am engaged in the grain business. I own stock in the Michel Coal Mines, Limited, and at one time was vice president, but cannot say the exact date, although I believe it was from November 25th, 1905, until February 19th, 1906; two terms, two years—two or three years I was vice president; I don't know the dates. During the time that I was vice president I know who had the active business management of the affairs of the corporation.

MR. GARRECHT.—Q. Who did have?

A. The Inland Surety Company. The individuals or persons were R. G. Belden and Mr. Hemphill. I would not say for positive whether Mr. Wayland was in at that time or not.

On cross examination by Mr. Williams he testified as follows:

I believe I was vice president part of the time; at least they notified me I was. The reason that I say that the Inland Surety Company had the management of the Michel Company was because that was the company that was promoting the mines. What I mean is that they were the ones that had the sale of the stock.

MR. WILLIAMS.—Q. And when you say they

had the management, that is what you refer to, that they had the authority to sell the stock?

A.—Yes, sir.

On redirect examination by Mr. Garrecht he testified as follows:

MR. GARRECHT.—Q. Mr. Hart, who had charge of the development work at the mines?

A.—Why, I believe Mr. Belden and the Inland Surety Company, whichever it was, as near as I know.

RECROSS EXAMINATION by Mr. Williams:

Q.—You mean they did the work on the property?

A.—They hired it done.

Q.—That they let the contract or something of that sort?

A.—Yes, sir.

Q.—And were these contracts in writing?

A.—I couldn't say; I never saw a contract.

Q.—Then that is simply hearsay or surmise on your part, is it?

A.—From letters that they wrote to me, what they were doing.

Q.—Did they tell you that they were doing it or that the Michel Company was doing?

A.—On the Michel property you are talking of now.

Q.—Yes.

A.—That they were doing it for the Michel was the understanding.

Q.—As I understand you to say, your understanding was it was the Michel Company doing the work, and not either Belden or the Inland Surety Company or some of those people interested in that coal property?

A.—They were doing the work for the Michel.

(Witness excused.)

G. W. JONES, a witness called and sworn on behalf of the Government, testified on direct examination by Mr. Garrecht as follows:

My name is G. W. Jones, and I have lived in Spokane for nine or ten years. I am not engaged in business at the present time but at one time was interested in the Michel Coal Mines Limited. I had a talk a couple of times with Mr. Belden in regard to the Michel properties. As to Mr. Wayland I do not remember. He may have been present and might not. I think this conversation was in August, 1909. Mr. Penn, one of the promoters, owed me a mortgage and couldn't pay it, and he wanted to pay the interest and wanted to turn in some Michel property and I didn't want the property but he praised it so; said there was walls of it there in sight, and that they was waiting for a railroad to get in—

MR. WILLIAMS.—I object to that.

MR. GARRECHT.—We want you to tell what Mr. Belden said.

A.—When I went in to see Mr. Belden about it, Mr. Belden said the stock was twenty-five cents a share and wanted to sell me some and he said that the stock was going up to thirty-five cents in a month and I says “Mr. Belden, if the stock is going up to thirty-five cents will you give me ten cents a share for ten thousand or twenty thousand shares?” And he says “We are not buying, we are selling.” He told me that the Michel Company owned the property but did not mention any names. He said that they have found a big strike on the property and were going to ship just as quick as the railroad got in.

On cross examination by Mr. Williams he testified as follows:

The conversation I have just related was in Mr. Belden’s office and it was in the year 1909 and I think in August. I am pretty sure it was. I can tell by looking at the papers. I went there for the purpose of inquiring about the stock, on the recommendation of Mr. Penn, who told me to go and see Mr. Belden. I told Mr. Belden that Penn had sent me. I didn’t tell him anything about that ten or twenty thousand, who I had the deal with, but told him about this one thousand that I had taken; in fact they put the certificate on record. I had already made my deal with Penn when I went up to see Belden. My visit to Belden had nothing to do with the stock I secured from Penn. Belden told me that the stock was held at twenty-five cents a share and that the company was going to raise the price to thirty-five cents a share. I

do not think I talked with him about the Crown Company but he might have showed me a map. He showed me a map at that time of different locations, but he didn't let me know that they owned any. At that time I was not familiar with the Crown Company nor with any of the others. I could not be certain whether I talked with him about more than one coal property when I was there or not. He might have mentioned the Crown, and he might not. Our subject mostly was the Michel property. What I have already testified to is simply the impressions on my mind that were put there by Mr. Belden at that time, and I am giving my impressions. In regard to the coal on the property he showed me a chart and told me the coal was right there and all they was waiting for was the railroad. He did not say where the strata of coal was but we were talking about the Michel mine. This was in 1909. He did not tell me where the strata was because I was not acquainted and it would not have made any difference. He told me how wide the strata was but I have forgotten. He told me it was right on the surface. He also told me how far they had traced it along the surface but I have forgotten the exact distance, but it was quite a ways. He did not tell me whether they had opened any veins or not, but that the coal was right on top of the ground, walls of it. He did not tell me whether they had found any of it in the creek bed; told me nothing about the creek. I do not remember if he told me they had found any of it scattered on top of the ground. He showed me maps where he claimed the coal was. The map

which he showed me was not a blue print, but a dark colored map. I never attended any meetings of this company. I know that the talk that I had with Mr. Belden was in 1909 and I fix the date by the date on the certificate which I got from Mr. Penn, and Penn wanted me to get a thousand dollars worth more. That was in 1909, in August. I know that. At that time I was not personally acquainted with Mr. Belden and had never done any business with him before. In regard to Mr. Belden having had considerable photograph work done with me prior to that time I would say that he never did to my knowledge, although he might have come into the store and left photographs with the clerks and had them developed in the dark room and I might not have seen them. My place of business along about that time was 1903 Riverside, but I am not in business; I closed the store. At that time I was in the business of photographic supplies. The map which you are now showing me is not the one that Mr. Belden showed me or is it anything like it. Prior to that time I do not believe I had been acquainted with Mr. Belden at all and did not know him by sight. He might have been in the store and I might have waited on him at some time and did not know who he was. Since that time I think I have been in Mr. Belden's office three different times, that is to see Mr. Belden, but I was in his office very often and talked to the lady very often in the office about the Michel stock. At the time I had the conversation with Mr. Belden I do not think there was anybody else present in the room. If there was I didn't notice

it. I do not know whether I went into his private room or not, but it was an office off of the main office, off of where you go in.

(Witness excused.)

BAPTISTE LAMEREAUX, a witness called and sworn on behalf of the Government, testified on direct examination by Mr. Garrecht, as follows:

My name is Baptiste Lamereaux and I live at Crows Nest and have lived there for the last twelve years. I know where the Michel claims are located and have been there. I know Mr. Belden and Mr. Wayland and they have both been there. Mr. Belden and I located these claims. I believe I worked two years for the Michel Company but I don't remember exactly what years. I think I started to work there in 1905. I was prospecting on the claims, but did not locate any coal veins on them. I do not know exactly how long I was prospecting but I believe it was two summers.

On cross examination by Mr. Williams he testified as follows:

I only prospected the two years on the Michel. I have prospected for a number of years on the Michel and the Crown. I am not able to write but in the correspondence had with Mr. Belden and Mr. Wayland I do not remember who wrote my letters for me but there were some of them written by Andy Good. I am not able to sign my name. Whenever I desired to write a letter I simply went to some one

and had them write it for me and sign my name, and under circumstances like that I wrote a number of letters to Belden and Wayland.

A letter marked DEFENDANTS' EXHIBIT "81" for identification was read to the witness.

I think Andy Good wrote that letter for me but I don't remember exactly. I think it was.

A letter marked DEFENDANTS' EXHIBIT "82" for identification read to the witness.

I don't know exactly if that letter was written by Mr. Good, but I remember sending a letter like that.

A letter marked DEFENDANTS' EXHIBIT "83" for identification.

In regard to the copies of the two letters which have been shown me I do not remember whether I have the originals of them or not. I have not turned any letters over to the Government. I think I never kept any of my letters and might have destroyed them.

(Witness excused.)

L. W. LLOYD, a witness called and sworn on behalf of the Government, testified on direct examination by Mr. Garrecht as follows:

My name is L. W. Lloyd, and I live at Camas Prairie, Montana. At one time I lived in Palouse City, Washington, where I was a hotel keeper, during the years 1905, 6 & 7. I traded for stock in the Michel Coal Mines Limited. I talked with Mr. Wayland about this property. He told me it was a good propo-

sition, that they had been doing some work on it, tunneling and building bunk houses and kitchen and blacksmith shop, I believe. He said they were coal propositions, showed it.

MR. GARRECHT.—What property, if any, did you exchange for the coal stock?

A.—Lots in Lidgerwood.

MR. GARRECHT.—Q. Did Mr. Wayland tell you what was to be done with the property that you turned over to the company?

A.—Yes.

Q.—State what he told you would be done with the property?

A. —It was to be used for the development of the Michel Coal Mines.

The letter which you show me they wrote to me at Nez Perce City, saying that they were issuing stock to stockholders. I received the letter through the mails.

MR. GARRECHT.—I offer the letter in evidence.

PLAINTIFF'S EXHIBIT "84" admitted

PLAINTIFF'S EXHIBIT "32" admitted without objection.

In pursuance of this circular I made subscriptions to the stock of the Michel Company and received certificates for the shares of stock named therein.

(Witness excused.)

H. S. HOUSE, a witness called and sworn on behalf of the Government, testified on direct examination by Mr. Garrecht as follows:

My name is H. S. House, and I am expert bank accountant for the Department of Justice and have held that position about four years and a half. Immediately prior to going with the Department of Justice I was in the Rigg National Bank in Washington for about three years; and for a year and a half prior to that I was in the treasury department in Washington, and four years before that I was in a small bank in Missouri. I have examined the books of the International Development Company, and the Michel Coal Mines Limited, that have been introduced in evidence here and have made a specific examination of those books in reference to the purchase by R. W. Lloyd of 125 shares of the Michel Coal Mines stock.

(Witness temporarily excused.)

MRS. LUCY SHEPPARD, a witness called and sworn on behalf of the Government, testified on direct examination by Mr. Garrecht as follows:

My name is Lucy Sheppard and I live in Butte, Montana, but lived in Spokane before I was married. My name at that time was Burke, Lucy Burke. I was at one time employed in the office of Messrs. Belden & Wayland, my duties being that of book-keeper; and I also did some stenographic work. I took instructions from both of them in directing what entries should be made and on what books they should

be made. Mr. Wayland was supposed to be in charge, but he took his instructions I think from Mr. Belden, that is, according to how the entries should be. I kept books, that is, made entries in the books of the International, Michel, Crown, Empire, the Mills and I have forgotten the others if there were any.

MR. GARRECHT.—Q. Were the books of the various companies correctly kept?

A.—I did. I was there from the latter part of February but my salary did not begin until the first of March, 1910, and I left in August, 1911, August 31st.

ON CROSS EXAMINATION by Mr. Williams she testified as follows:

I did not always consult someone in making every entry; only the entries that were in question. I would consult someone whenever a question arose in my mind as to how the entry should be made; I always got information. Otherwise I went ahead and kept the books and made the entries myself unless there was a question. It is a fact that both Mr. Belden and Mr. Wayland were out of the city a large portion of the time while I was there, but in case of a question usually the stock was held up until someone came in. They were not always accessible to speak to, but in cases of that kind, why, things were kept over. That is, if it was a matter of question in my mind I would hold it open until I could talk to someone.

(Witness excused.)

J. B. CHRISTOPHERSON, a witness called and sworn on behalf of the Government, on direct examination by Mr. Garrecht, testified as follows:

My name is J. B. Christopherson, and I live at Opheim, Montana, and I am a farmer by occupation. At one time I was in the employ of Messrs. Belden & Wayland as bookkeeper, during 1909 and a part of 1910. I do not remember the exact date in 1910 when I ceased to be employed there, but sometime in the month of February. Miss Burke succeeded me I think. I began work sometime in March, 1909. In the office there, that is, the office of Messrs. Belden & Wyaland, I kept the books of the International Development Company, the Crown Coal & Coke Company, the Michel Coal Mines Limited, the R. G. Belden Company, the Empire Coal & Coke Company, and I think there was the Mills Syndicate under Belden and Wayland. At times they would direct me what entries should be made on the books of all of these different corporations. According to the information that was given me, the entries in the books were made properly as far as I know, and correctly also.

ON CROSS EXAMINATION by Mr. Williams he testified as follows:

I asked for instructions as to any entry whenever I was in doubt. Belden and Wayland were out of the office a large part of the time but in such case if I was in doubt I would hold up the books, but that would only refer to an item that I was in doubt about;

and if I was in doubt about some item I would hold that up until they returned so I could find out something about it. When I spoke of being employed by Belden & Wayland I meant the International Development Company, with which Belden and Wayland were connected. I kept the books of all of these companies.

MR. WILLIAMS.—Q. It is a fact, is it not, that some of these companies, the International and the Michel and the Empire, made a lump payment monthly to the International Development Company for the purpose of assisting in defraying the expenses of their work?

A.—I don't know in regard to my salary.

(Witness excused.)

J. H. HEMPHILL, recalled on behalf of the Government, testified on direct examination by Mr. Garrecht as follows:

During the time I was with the International Development Company I kept the books part of the time, and I kept not only the International Development Company's books, but the stock book of the Michel. I think I opened that; and the Crown books I opened. I had nothing to do with the Empire and am not sure that I opened any books for the Michel Company except I opened the stock register, or stock ledger. I cannot tell without looking at the books the exact dates between which I kept the books of these com-

panies. It was evidently from May, 1905, to September, 1907, since I have refreshed my memory. I don't remember who succeeded me as bookkeeper but there was a man that we had in the office for a short time who was not very successful and I think I then kept the books for a little while longer. The entries which I made were correct, according to the information which I received. I do not believe any one directed the entries that were made in the books as I had charge of that absolutely.

ON CROSS EXAMINATION by Mr. Williams he testified as follows:

I suppose that the records were kept correctly; I did the best I could to keep the books; they showed a balance, but there might have been some mistakes made. I severed my connection with the International Development Company I think in August, 1908. During the remainder of the year 1907 and up to August, 1908, I occasionally directed entries in the book. The fact of the matter is that Mr. Belden, Mr. Wayland and myself would occasionally suggest to the bookkeeper the entries. That would arise when the bookkeeper would come to me and say: "How should this be entered?" or "Where should it be entered?" and I would try to tell him correctly. The bookkeeper usually came to me for instructions. I think during the entire time from May, 1905, till September, 1907, I did all of the bookkeeping myself.

MR. GARRECHT.—Q. During that time you made no intentional errors?

A.—No, sir.

(Witness excused.)

MISS RETHA COVINGTON, recalled as a witness for the Government, on direct examination by Mr. Garrecht, testified as follows:

I have kept the books of these corporations since March, 1912, but prior to that time I helped keep the stock registers and stock certificate books of the various companies. Ever since I have been with the company I have done some work on the stock ledgers, transferring stock and things of that kind, that is, since 1905, December of 1905. In regard to the entries which I made in the books, and the work of that kind which I did I may have received instructions from Mr. Hemphill or Mr. Belden or Mr. Wayland or might have been Mr. Butterfield; might have been any of the men that happened to be in the office at the time that had anything to do with the company's work. Mr. Butterfield has come into the office a number of times and told me to make transfers. This, however, would be in the ordinary course of my duties, when the certificates were surrendered, and I always tried to make them correctly.

Outside of the mere transfer of certificates which Mr. Butterfield surrendered to me at the time they were made I do not think he ever directed me to make any other entries in the books. After Mr. Hemphill severed his connection with these companies in 1908 he never at any time directed me to make any entries

in these books. So far as I know, the entries that I made in these bookos were correct, from the information that I had at the time.

ON CROSS EXAMINATION by Mr. Williams she testified as follows:

I was trying to keep the records straight but do not mean to say that I didn't make any errors; none of us are infallible; I guess we all make mistakes. I would not always go to Mr. Belden or Mr. Wayland or some of these parties for instructioons in making the entries. In fact, I appealed to them for instructions in very few cases. They were very seldom consulted in regard to the stock register entries; we seemd to think there was no occasion. With reference to the credits of moneys or things like that, I had nothing to do with that at all; they were entered up by the bookkeeper. Once in a while, if I was in doubt and didn't know exactly what to do, I would go to Belden and Wayland, but very few times I ever consulted either of them. During this time Mr. Belden and Mr. Wayland were out of the city a great deal of the time, more than half of the time during some years. I do not remember of either Mr. Belden or Wayland having made personal entries themselves. I do not know of any entries being made in the books improperly; I had no knowledge of it if such was the case.

ON REDIRECT EXAMINATION by Mr. Garrecht she testified as follows:

During the absence of Mr. Belden and Mr. Wayland I had charge of the books and the office.

(Witness excused.)

(Adjournment until 10 A. M.)

C. W. HILL, recalled for cross examination by Mr. Williams, testified as follows:

Q.—Mr. Hill, referring further to the question of Mr. Belden's guarantee to return the money that you invested, I will ask you if it is not a fact that this is what happened between yourself and Mr. Belden: That you received in purchasing this stock, what is known as an advance certificate, the original certificate not to be delivered to you for a period later, to the end that you could not sell the stock at that time in competition with the company, and that Mr. Belden agreed with you at that time that in your particular case you might sell sufficient of your stock in case the necessity arose, so as to realize a portion of the five hundred dollars invested, and that is what happened between yourself and Mr. Belden?

A.—I don't think so. I know that he gave me a receipt. I would not buy the stock unless he gave me a guarantee to return the five hundred dollars inside of a year; I am positive of that.

Q.—Just answer that question straight, will you say that that agreement was not made by Mr. Belden with you.

A.—At the time I bought the property?

Q.—The one I have stated, yes?

A.—They might have said something about selling a part of it. I think I got the whole ten thousand shares in one certificate when I first got it, if I remember right, and I told them afterwards I would like to have the certificate changed and two certificates so I could sell a part of it and realize the five hundred dollars out of it. That is all I remember.

MR. GARRECHT.—Do you want to make an explanation of your testimony yesterday?

MR. GARRECHT.—The witness spoke to me outside.

A.—I would like to.

THE WITNESS.—Would you let me see this letter that you showed me yesterday?

MR. GARRECHT.—I will read the letter.

“Dear Sir: Through Mr. Belden we understand that you have been promised the privilege of disposing of sufficient of your stock—” etc.

Q.—You said yesterday that you purchased your stock several days prior to February 12th, 1906, and that you had an arrangement that you might get your money back within one year and that within about nine months from that time you desired the money returned and it was not returned?

A.—Within the year.

Q.—And as I understand you today, Mr. Hill, you had become dissatisfied with the thing about nine months afterwards and did not want any more to do with it. Now, I will ask you if it is not a fact that you were negotiating for more stock of the Michel Company more than a year after your original purchase?

A.—No, sir; that was not the idea. That Washington Meteor stock was considered worthless, or nearly so.

Q.—Washington Home stock?

A.—I had 8000 shares with a broker here to sell.

THE COURT.—I think this matter has all been gone over.

MR. GARRECHT.—He wants to show his explanation of that letter, that they are going to show he was going to trade stock although he thought the stock valueless.

R. W. LLOYD, recalled for cross examination by Mr. Williams, testified as follows:

Q.—Now, you say that you talked with Wayland concerning these properties?

A.—Yes, sir.

Q.—I understood you to say that what Wayland told you was that they were doing some work on the Michel Company, that they had erected a blacksmith

shop and that he thought it was a good proposition. Is that correct?

A.—Yes, sir.

I traded two lots in Lidgerwood for some of this stock. Mr. Wayland wrote to me in regard to trading these lots, as an officer of the R. G. Belden Company, as its secretary. The fact is I turned these lots over at the time I made this trade to the R. G. Belden Company. I have no recollection of having been notified by Mr. Wayland in a letter that the company, so far as their stock was concerned, was selling only for cash or approved notes. The most of the letters that I have received from either Belden or Wayland or the R. G. Belden Company have been destroyed. I have none of them at all, and have furnished none to the government except the carbon copy which was put in evidence yesterday. I have no recollection whatever of having received the letter which you show me marked "plaintiff's exhibit 85" for identification. I wrote the letter which you show me.

DEFENDANTS' EXHIBIT "86" admitted.

MR. WILLIAMS.—Q. Will you say about that, Mr. Lloyd, does that refresh your recollection now any as to whether you received this letter marked Exhibit 85 for identification?

A.—I would not say positively that I received it or didn't receive it. That is in regard to that oil

stock trade. That is my letter (referring to exhibit 86). I wrote this other letter which you show me.

The letter identified by the witness marked DEFENDANTS' EXHIBIT "87", for identification.

In answer to that letter I received this letter which you show me about the date that it bears, September 28th, 1906, although I cannot be absolutely sure about the date of its receipt.

The letter identified by the witness marked DEFENDANTS' EXHIBIT "88", for identification.

MR. WILLIAMS.—You know now, do you not, Mr. Lloyd, that the trade that you were making, you were making with the R. G. Belden Company?

A.—Yes, I suppose so; it was through Mr. Wayland I was making it.

Q.—Now, you are quite sure that it was two lots, Mr. Lloyd?

A.—Well, that is my understanding. The deed was made through another party.

Q.—The fact of it is that you had taken an assignment of a contract for a lot in Lidgerwood Park from a Mr. Demorest?

A.—Yes, sir.

Q.—And later you had wanted to trade any equity you had in that lot in to the R. G. Belden Company for this coal stock?

A.—Well, Mr. Wayland wrote to me first in regard to it.

THE COURT.—Answer that question directly.

A.—Yes, sir. I cannot give you the exact legal description of the property in Lidgerwood as I have lost all recollection of these lots.

MR. WILLIAMS.—Q. How did you expect that the Michel Coal Mines Limited was going to use a vacant lot out here in the development of the coal property, Mr. Lloyd?

A.—I had no idea how they were going to use it. They made the proposition to me and I took it.

On REDIRECT EXAMINATION by Mr. Garrecht, he testified as follows:

Q.—Did you in that trade which you had about the lots, have anything to do with the other purchase of 125 shares that you got afterwards?

A.—No, sir.

(Witness excused.)

H. S. HOUSE, recalled on direct examination by Mr. Garrecht, testified as follows:

Q. Have you made a specific examination of the books with reference to the purchase by R. W. Lloyd of 125 shares of the Michel Coal Mines stock issued, certificate No. 400?

A.—Yes, sir, I have.

Q.—Will you show from the books where the money went and what stock was issued therefor?

A.—Referring to Government's exhibit No. 45, which is the stock certificate stub book of the Michel Coal Mines Limited—

A.—Reading from Government's Exhibit No. 45 which is a stock certificate stub book of the Michel Coal Mines, certificate No. 400 for one hundred and twenty-five shares was issued to R. W. Lloyd, Nez Perce, Idaho (reading the stub of the certificate). Now, reading from Government's Exhibit No. 34, cash book of the International Development Company, page 42, on the left hand side it says (reading). 93 is the ledger page, \$25.00.

MR. GARRECHT.—Q. Now, state to the jury what this entry shows, as an expert?

The International Development Company was the owner of the original certificate. From the time the Michel Company was organized in 1905 up to January 1st, 1912, there had been disposed of treasury stock of the Michel Coal Mines, a total of 290,560 shares of stock.

MR. GARRECHT.—Q. During that time how much of the treasury stock of the International Development Company was sold?

A.—There had been disposed of 963,532 shares.

MR. GARRECHT.—Q. How much treasury stock was disposed of during 1909?

A.—There was 500 shares disposed of, for which the company received nothing.

MR. GARRECHT.—Q. Now, how much was received from the sale of the treasury stock?

A.—The Michel Coal Mines Company Limited received for their treasury stock \$26,838.75.

MR. GARRECHT.—Q. Now, during the year 1909, the same period, how much of the treasury stock of the International Development was sold, of the Michel?

A.—The total I gave you was the entire amount received for treasury stock; not just for that one year.

MR. GARRECHT.—Q. What was the total received for the International Development's stock?

A.—The International Development Company received for their stock that was sold, for their personal stock that was sold prior to January 1, 1912, a total of \$85,399.24.

ON CROSS EXAMINATION by Mr. Williams, he testified as follows:

As to the question of sales of personal stock of the amount which I have mentioned, this was actual sales. It may include a little stock that was given out as a bonus to Miss Covington and a few sales like that of a few shares. I have the tabulation here by years and I have copies of this which you may have. The figures which I have given as the sales of the Inter-

national Development Company was all the sales that they made, including the stock that was charged to the agents' accounts, in lieu of commissions due them, some of it being given out as agents' commissions. My tabulation does not show how much stock they returned.

(Witness excused.

W. J. WOODS, called and sworn as a witness on behalf of the Government, testified on direct examination by Mr. Garrecht as follows:

I live at Waitsburg and have lived there about thirty-two years and am engaged in the business of farming. I know both of the defendants in this case. At one time I owned stock in the Michel, the Crown and the Empire. I have seen a prospectus like Plaintiff's Exhibit 31 for identification before and have had that in my possession. I got it at the International Development Company's office in the Peyton Building. The defendants Belden and Wayland gave it to me together with a bunch of literature they were making up for me to take to Waitsburg.

PLAINTIFF'S EXHIBIT "31" admitted without objection.

ON CROSS EXAMINATION by Mr. Williams he testified as follows:

Q.—Mr. Woods, you say that you purchased some stock?

A.—Yes, sir.

Q.—You retained the stock?

A.—No, sir.

Q.—That is, you sold it to somebody else later?

A.—Yes, sir, I did.

Q.—You didn't pay anything for the stock, did you?

A.—Some of it. Do you have reference to the Michel or some other?

Q.—Well, the Michel?

A.—No, I gave my note in payment.

Q.—Never paid it?

A.—I gave my note, I say.

Q.—Yes, but you never paid the note?

A.—No, sir.

(Witness excused.)

J. J. THOMAS, called and sworn on behalf of the Government, testified on direct examination by Mr. Garrecht as follows:

My name is J. J. Thomas, and I reside in Philipsburg, Pennsylvania. By occupation I am a mining engineer and have followed that profession for seventeen years. I have been on the property of the Michel Coal Mines Limited, the Empire and the Crown Coal & Coke. I made a surface examination and in the tunnel of the Michel property.

It was about the first week in June, 1911, that I made an examination of the Michel property. At that time I was working under the direction of Mr. C. L. Hower, who was mining engineer of the property or rather mining engineer for the Crown Coal & Coke Company. I made the examination at the request of Mr. Hower, who had made a report on the property sometime before that, and he asked me when I first went in on the property to make a further and more extensive examination of the Michel group of mines, to make sure if there was any coal on the property; so I spent about three days down there before going up on the Crown to continue the work. This was not when I first came up to this section. I found no coal on the Michel property. I had charge of all the field work that was being done up there on the Empire, the Michel, and the Crown properties. In regard to what I did on the properties, I would say that on the Michel property, these four claims in here (indicating) I came on down to a little below, about a mile or a mile and a quarter below the part in which measures were exposed, and I traced them up for about half a mile, and I found in there the Bampf shale exposed to a thickness of about six hundred feet. Coming up along the creek I found exposures of the Fernie shale clear all the way up to the camp. Fernie shale is below the coal. There could not be any coal below the Fernie shale; after you find the Fernie shale exposed you would not expect to find any coal beneath it. I am a geologist, as pertains to coal; I am not a metallurgist. At the

time of the period of mountain building the frost came from the west and the rocks and the plains resisted and when the fracture took place it uplifted the mountain in a series of what we call overlaps and step faults, and in which lays the rocks of the Devonian and carboniferous period, which are really a whole measure in this little step fault. For instance, here are the rocks of the Devonian carboniferous period, and these over here of the Cretaceous age, on top of it, and these in time eroded away until the harder rocks of the limestone period remained, and the peaks of the mountains are composed of these; and these faults, these series of steps, there would be one like that and one coming up this way and on back (illustrating) the coal laid in between them.

(Here the witness illustrated the formation by the use of books and a drawing on the black board). The coal would always be above the Fernie shale and the Bampf shale and when you get down below the Fernie shale and the Bampf shale I would conclude that there would be no coal, we would be below the coal; there would be a barren area below that. On the Michel I found the Bampf shale, which is a barren area. I examined the tunnel that was in the Michel and found it to be in a combination of the Fernie shale and Bampf shale, where they began to bind together. The tunnel had been constructed to the Fernie shale, right into it, and it is very improbable that there would be any coal discovered after that. I also examined the Empire. You go up this creek on the

Empire, this gulch, up probably half a mile, a quarter of a mile, and you find limestone rocks there exposed very clearly all along that cliff. That would indicate barren territory with no likelihood of coal being there. The Empire tunnel is right in here (indicating). That was not on the Empire ground but on ground belonging to the Crown Coal & Coke Company. There was no tunnel whatever on the Empire property and no opening that I know of. The Crown ground is these four claims, and a fraction, colored in red. These are Crown granted and there is some leased sections, those colored in blue. There is coal on the Crown granted sections of the Crown Coal & Coke Company. The outcroppings of the seams are at the top of the mountain, as shown in this section (indicating) and would run around in about that direction (indicating), from here on down westerly, down these two sections. I have been over the Crown's land very thoroughly and all of the crown granted sections, at the least. However, the only coal found is on the four crown granted sections and I would judge, without looking at my notes, that there would probably be about twelve hundred acres underlaid with coal. During the time I was making my investigation both of the defendants were up there, both singly and together at different times. We have talked over the thing in an unconventional manner but I never made any definite report to either one of the defendants. I did, however, make a report to Mr. C. L. Hower, who was in the office of the defendants. Mr. Wayland and I discussed the

geology of the country up there. I had a talk with Mr. Wayland concerning the property in July, 1911.

(Whereupon Mr. Williams examined the witness in detail.)

J. H. HEMPHILL, recalled.

Page 5 of the minute book of the Crown Coal & Coke Company admitted without objection and marked PLAINTIFF'S EXHIBIT "89".

I staked all of the ten claims of the Crown Coal & Coke Company.

PLAINTIFF'S EXHIBITS "90" to "99" inclusive were admitted without objection.

To my positive knowledge there were no previous locations of these claims prior to the time I located them.

PLAINTIFF'S EXHIBITS "100" and "101" admitted without objection.

MR. GARRECHT.—Q. I will ask you to examine Plaintiff's Exhibits 100 and 101 and ask you to state to whom these shares of stock belonged, if you know?

A.—They belonged to the International Development Company.

Q.—You may state for how many shares of stock each of these certificates were?

A.—No. 9 is for fifty thousand shares and the other

one is for a hundred thousand shares. I think they were issued in the names of W. A. Hemphill and L. Whitney in order to make diversified entries, to show more diversified entries to the original promotion. I cannot say as to whether I had the proxies to vote this or not.

MR. GARRECHT.—Q. Did some member of the International Development Company have the proxies?

A.—I could not say as to the proxies at that time. May I answer the statement as I recollect it there?

Q.—Yes, you can explain your answer if you wish

A.—I don't think at that time the proxies were ever asked for. The proxies were sent out and whether they were sent in in my name or not I don't know. The proxies were sent out as directed under the by-laws of the company. Whether all of these proxies came in or not I do not know.

Q.—You said it was for the purpose of showing a diversified control. Now, why was that; what reason did you have for wanting that to appear; what reason was there for wishing that to appear?

A.—There had been a desire on the part of some of the people that came in for it and at the last minute some of the people who subscribed to shares didn't take them.

Q.—Was it one of the conditions required in order for the stock to be sold?

A.—I don't think so.

PLAINTIFF'S EXHIBIT "10" admitted without objection.

PLAINTIFF'S EXHIBIT No. "103" admitted over the objection and exception of the defendants.

(Witness excused.)

C. A. BRYAN, a witness called and sworn on behalf of the Government, on direct examination by Mr. Garrecht testified as follows:

MR. GARRECHT.—I want to offer specifically pages 29 and 30 of Plaintiff's Exhibit 54.

MR. WILLIAMS.—To which we object as incompetent, irrelevant and immaterial and having nothing to do with any of the issues in this case.

THE COURT.—It will be admitted.

(Defendants except and exception allowed.)

PLAINTIFF'S EXHIBIT "104" admitted in evidence.

My name is C. A. Bryan and I live at North Prosser, Washington, and am station agent for the Oregon-Washington Railroad & Navigation Company. I received a book like the one which you have shown me from the defendants, in the office. Mr. Belden either gave it to me or had Miss Covington give it to me.

MR. GARRECHT.—We offer that in evidence.

(Whereupon Exhibit 104 was read to the jury.)

MR. GARRECHT.—We offer page 31 of the Government's Exhibit 54.

PLAINTIFF'S EXHIBIT "105" admitted, being page 31 of Plaintiff's Exhibit 54.

MR. GARRECHT.—We offer pages 39 and 40 of Plaintiff's Exhibit 54.

MR. WILLIAMS.—To which we object as incompetent, irrelevant and immaterial and not within any issues in the case.

THE COURT.—It will be admitted.

(Defendants except and exception allowed.)

PLAINTIFF'S EXHIBIT "106" admitted.

MR. GARRECHT.—We offer this pamphlet in evidence.

MR. WILLIAMS.—To which we object as incompetent, irrelevant and immaterial and for the further reason it is not shown in the evidence it had anything to do with the defendants and not within the issues.

THE COURT.—Objection overruled.

(Defendants except and exception allowed.)

PLAINTIFF'S EXHIBIT "107" admitted.

On CROSS EXAMINATION by Mr. Williams he testified as follows:

Q.—Who did you say delivered to you the prospectus, Mr. Bryan?

A.—Mr. Belden either gave it to me or had Miss Covington give it to me.

(Witness excused.)

F. L. FERRELL, recalled, testified on direct examination by Mr. Garrecht as follows:

I had stock in the Crown Coal & Coke Company only, and before purchasing it I met Mr. Belden in Milwaukee.

MR. GARRECHT.—Q. State what was said and done between you and Mr. Belden with reference to the coal property.

MR. WILLIAMS.—May I ask a question on voir dire?

THE COURT.—Yes.

EXAMINATION ON VOIR DIRE
BY MR. WILLIAMS:

Q.—Mr. Ferrell, that was before the Crown was organized, wasn't it?

A.—Yes, sir.

Q.—That was with reference to your becoming one of the syndicate members and forming the Crown Coal & Coke Company?

A.—Yes.

Q.—And that syndicate turning the property over to the Crown?

A.—Yes.

Q.—Did you purchase any stock in the company after its incorporation?

A.—No.

THE COURT.—Did you at any time?

A.—I purchased it from other parties—I want to correct that answer. I did purchase some stock from the company later on yet, I will correct my former answer.

MR. GARRECHT.—Q. State, Mr. Ferrell, what was said and done between you and Mr. Beldeen in reference to this?

A.—Mr. Belden—he said that an option had been obtained on ten coal claims in the Crows Nest district of British Columbia; that these ten coal claims belonged to ten separate parties and that a syndicate was to be formed composed of twenty shares; six of these shares were to be given to the International Development Company for their trouble, their work and expenses in obtaining the option on these ten coal claims. The other fourteen claims (shares) were to be sold at fifteen hundred dollars a share.

This \$21,000, together with 100,000 shares of stock in a coal company that was to be formed here, which was afterwards named the Crown Coal & Coke Company, were to be handed over to these ten parties or

original owners of the coal claims. I agreed to go up and look at the property and in June of that year Mr. Smith of Milwaukee, Mr. Wheeler of Minneapolis and myself went up to Crows Nest, British Columbia and looked the property over. When I came back to Milwaukee I subscribed for one and one-half shares of this syndicate stock and sent a draft for \$2,250.00 to the International Development Company in payment of that. The company was formed in September of that year, 1906, in Milwaukee. All the papers for the formation of that company were made out in Spokane and sent to us in Milwaukee by Mr. Belden with instructions as to what to do in regard to forming this company. After the company was formed, for this \$2,250.00 I received 75,000 shares of coal stock and a proportionate rate of interest in a trustee's certificate calling for 150,000 shares of coal stock. The letter which you show me I received through the mails.

MR. GARRECHT.—We offer this letter.

This letter previously identified by the witness admitted as PLAINTIFF'S EXHIBIT "108".

The letter which you now show me I also received through the mails.

MR. GARRECHT.—We offer it in evidence.

The letter identified by the witness marked PLAINTIFF'S EXHIBIT "109" in evidence.

The letter which you now show me I received through the mails.

MR. GARRECHT.—We offer the letter.

The letter just identified by the witness admitted and marked PLAINTIFF'S EXHIBIT "110".

After the receipt of that letter I purchased ten thousand shares of stock. This other letter which you now show me I received through the mail.

MR. GARRECHT.—We offer this letter.

The letter just identified by the witness admitted in evidence and marked PLAINTIFF'S EXHIBIT "111".

The letter you now show me I also received through the mails.

MR. GARRECHT.—We offer it in evidence.

MR. WILLIAMS.—To which we object as incompetent, irrelevant and immaterial and not within any issues.

THE COURT.—It will be admitted.

The letter identified by the witness admitted and marked PLAINTIFF'S EXHIBIT No. "112".

MR. GARRECHT.—Q. I now ask you to examine Plaintiff's Exhibit 69, and state if that is the letter referred to in the one you just read; that is the one that was read yesterday?

A.—Yes, that is the one referred to. At one time I took a trip with Mr. Belden to Idaho and on that trip we had a discussion relative to the Empire property. I asked Mr. Belden how he could sell Empire

stock or stock of the Empire Coal Company when there was no indication of any coal on the property, and he replied that they did not pretend there was any coal there.

On CROSS EXAMINATION by Mr. Williams he testified as follows:

I did not reside in Spokane permanently, but temporarily; I resided here temporarily I think about six months, from September, 1909 to March, 1910. At that time I was not connected with the Crown Coal & Coke Company as an official but at one time I was president of the company, that is the first year, 1906, my term expiring the first part of January, 1907. I had the talk that I have referred to with Mr. Belden in 1909, I think in October, but I have no definite way of fixing the exact month or day, nor is there any way that I know of refreshing my recollection in regard to it. It was during my temporary residence in Spokane, and I came here in September, 1909, and left in March, 1910. I have no letters from Mr. Belden dealing with that period of time. We went to Idaho for the purpose of seeing the country and we were just traveling around together. I think I served as president of the Crown for one full term and part of another, and the portion of term that I served was before the regular term. It was in 1906 that I served the portion of the term. The company was formed in September, 1906, and then I think I served the full term in 1907 and went out of office in January, 1908. I was not up for reelection in the meeting of January;

1908; I never was up for re-election again. I served as vice president in 1908, but as to 1909 I don't remember whether I was vice president then or not.

MR. WILLIAMS.—Q. The fact is you are a particularly bitter enemy of Belden's, are you not?

A.—No, I wouldn't say particularly bitter enemy, no.

Q.—Well, are you a bitter enemy of his?

A.—No.

Q.—Haven't you stated since you came out here that you were coming out to Spokane for the purpose of putting Belden in the pen?

A.—No, sir.

Q.—Do you know where Kronenberg's saloon is in town?

A.—Yes, sir.

Q.—Were you in there on the evening of the 20th of this month?

A.—I was in there one evening I don't remember what evening.

Q.—Isn't it a fact that in Kronenberg's saloon on the evening of the 20th of this month in the presence of Mr. Kronenberg, one of the partners, and Mr. Shaffer, a bartender, you were addressing the assembled people there—you were intoxicated that evening, were you not?

A.—No, sir.

Q.—Were you under the influence of liquor at all that night?

A.—No, sir.

Q.—Weren't you announcing to the assembled people there that you came out to Spokane for the purpose of sending Belden and Wayland to the penitentiary?

A.—Not that I remember of, no.

Q.—Did you make any statement in there about what you were going to do to Belden and Wayland?

A.—No, sir, not that I remember of.

Q.—Now, the fact is that practically you have been an enemy of Belden and Wayland since the stockholders' meeting in January, 1910, isn't that a fact?

A.—Well, I haven't had any friendly feeling for them, no.

Q.—You came out here for the purpose of controlling that meeting, didn't you?

A.—No, sir, not that time.

Q.—And isn't it a fact that that combination broke down because Mr. Butterfield finally didn't come through and support you?

A.—He didn't vote with us.

THE COURT.—I think this inquiry has proceeded far enough.

I do not remember what particular point in Idaho we were at when Belden made the statement I referred to. It was on the train. I think we were in Idaho but I wouldn't exactly state that. I do not remember how long we had been out of Spokane but it was a continuous journey from Spokane on the train. No other person was present when this conversation happened. I had never looked over the property but had read the prospectus in Belden's office. I had never prospected this property and had never looked over it to see whether there was coal there or not, nor had I had an investigation made for me for that purpose. I knew that there had been no work done up there and from what I had heard in the office there had been no coal uncovered there.

Q.—What you asked Mr. Belden was why they were selling stock when they had not found the coal yet; is that it?

A.—I said when there was no indication of coal on the property.

Q.—Did Belden tell you there wasn't coal on the property?

A.—He said they didn't pretend there was any there.

Q.—That there wasn't any coal under the ground?

A.—Well, that is just as I remember it.

Q.—Was he referring at that time to surface indications or what?

A.—I don't know what he was referring to.

Q.—You didn't understand him as stating that the strata of coal was not under the ground?

A.—Why, I understood him to mean that there was no coal there as far as—there had been no coal found on the property.

Q.—What you understood was that it was not proven coal ground yet?

A.—Yes.

Q.—What is your business?

A.—Grain business.

Q.—You sell on margins, do you?

A.—Yes, buy on margins. The letters that have been presented here from either Mr. Belden or anybody else are not all the letters I received; I think I sent some more out here. The letter which you show me marked Defendants' Exhibit 131 for identification is my letter and that is my signature, as is also Defendants' Exhibit 114 for identification. I am acquainted with Herman Smith who at one time lived in Milwaukee but at present lives in Philadelphia. He was engaged in the grain business, he and I having offices together, that is desks in the same room. He is a particular friend of mine and I am familiar with his signature. The document marked Defendants' Exhibit 113 for identification is in his writing and is his signature. This stock that I bought later on, it is

stated in this letter was part of this stock that Belden and Wayland were buying from others but I didn't know just where they were getting it. I am referring to the ten thousand shares for which I paid fifteen cents per share. I did not consider that I went into partnership with them in buying this stock, but bought it outright. I never asked to go into partnership, but I don't think the proposition ever came from me, if I remember right.

(Whereupon an adjournment was taken until Monday, April 27th, 1914, and thereafter court duly convened, all parties present as heretofore.)

F. L. FERRELL resumed the stand for further cross examination by Mr. Williams and testified as follows:

The letter marked Defendants' Exhibit 116 for identification was received by me from Mr. Belden, also Defendants' Exhibit 117 for identification. After the organization of the Crown Coal & Coke Company I was acting as its agent in the sale of its stock, and there were a number of other people acting as agents in the sale of this stock other than the International Development Company, including Mr. Butterfield. I would consider that that continued up to the time of this annual meeting that I referred to on Friday, which was held in January, 1910, although I did not sell any stock in that company I do not believe after about the latter part of 1908 if I remember correctly. As far as I know, up to the fall of 1909 the sales that

had been made of treasury stock were cash sales; at least I always supposed they were cash sales. I never knew of the company authorizing sales on notes; I don't remember of it anyway. I think my total sales were about twenty thousand shares, if I remember correctly, that is, cash sales. The person who made the sale got the commission and the International Development Company did not take any part of it. During all this period of time the International Development Company was furnishing quarters for them here in Spokane, although I think the Crown was paying rent. Mr. Wayland was secretary of the company and receiving a salary for doing the work. Along in 1907 it was voted to pay Mr. Belden two hundred dollars a month salary and an allowance was voted to Wayland of two hundred dollars a month, and an allowance to Belden for a part of the year of fifteen hundred dollars for acting as general manager up at the property. I am not sure that out of that they were to pay the office expenses of these companies and employ the office help. I think it was two years that Belden and Wayland received salaries from these companies; I think it was 1908 and 1909. I know that Mr. Butterfield was voted fifteen hundred dollars a year salary by the Crown Company, but I do not know that they paid only one-half of his salary.

MR. WILLIAMS.—Q. And you know that Butterfield during that time was working on the time of the flotation of these companies and getting the railroad in?

A.—He was working on a bond issue, I believe.

Q. That is, you all realized in the early stages of the proceedings that it was necessary to raise money by a bond issue in order to build the road and start the operation of the Crown?

A.—I recall that at the meeting in January, 1910, Mr. Wayland demanded of the meeting that his books and records should be experted by auditors, and that LeMaster & Cannon, certified accountants of Spokane, were employed to go over the books and audit them. They were audited at that time but I do not know anything about subsequent audits.

On REDIRECT EXAMINATION by Mr. Garrecht he testified as follows:

The only company I was a member of was the Crown Coal & Coke Company and I did not have anything to do with the various other companies and know nothing about their affairs. When I answered questions that embodied these other companies my answer was confined strictly to the Crown Coal & Coke Company. While I was acting as agent in the sale of the Crown stock I was selling treasury stock and at no time sold any of my personal stock. The salary which I mentioned which was received by Mr. Butterfield amounting to fifteen hundred dollars per year from the Crown was the only salary I knew he was getting. I was subpoenaed by the marshal in Milwaukee to appear at this trial.

On RECROSS EXAMINATION by Mr. Williams he testified as follows:

I did not investigate to see whether I had to obey the subpoena at that distance.

PLAINTIFF'S EXHIBITS "118", "119" and "120" admitted in evidence without objection.

(Witness excused.)

ALFRED BALLENTINE, called and sworn as a witness on behalf of the Government, on direct examination by Mr. Garrecht testified as follows:

My name is Alfred Ballentine and I live in Milwaukee, and I am a member of the Clearing House and Chamber of Commerce. I have investigated in some of these coal companies, namely, the Crown Coal and Coke Company. The letter which you show me I received through the mails.

MR. GARRECHT.—We offer it in evidence.

PLAINTIFF'S EXHIBIT "121" admitted.

I cannot say whether the attached paper was a part of that letter or whether I received it later.

MR. GARRECHT.—We now offer in evidence the letter of August 24th, '06.

PLAINTIFF'S EXHIBIT "122" admitted.

After hearing the letter read, I think this is the copy referred to and think I could say positively that is the copy referred to, and think I could say positively that that is the letter referred to.

MR. GARRECHT.—We now offer this as a part of that.

MR. WILLIAMS.—To which we object for the same reasons as the letter.

THE COURT.—The same ruling.

The document attached to EXHIBIT "122" admitted.

MR. GARRECHT.—Q. Now, Mr. Ballentine, how many shares of stock did you purchase in the Crown Coal & Coke Company?

MR. WILLIAMS.—May I ask the witness a question?

THE COURT.—Yes.

EXAMINATION ON VOIR DIRE by Mr. Williams:

Q.—Your purchase in this company was in the syndicate, that is, you were one of the syndicate that took over the property?

A.—Yes.

Q.—And that was the question of your purchase, was it?

A.—Yes.

A.—I understood that this was to be a syndicate and at that time I had not purchased my shares. I was to be allowed 50,000 shares of stock for \$1500.00 and was afterwards allowed 7,500 shares additional

of the treasury stock and received those shares after the company was organized. That is, we got a certificate for 50,000 shares and that certificate was recorded for some reason that I cannot say just now and another certificate for 50,000 shares was issued to us, and that certificate was sent out here to be put in escrow in the Bank of Montreal and was to be held for two years. My stock remained in the Bank of Montreal for probably three years. I received the 7,500 additional shares after the meeting of 1910.

PLAINTIFF'S EXHIBITS "123" and "124" being pages 17 and 19 of the stockholders' minute book of the Crown Coal & Coke Company admitted in evidence without objection.

On CROSS EXAMINATION by Mr. Williams he testified as follows:

I am acquainted with Mr. Ferrell and am a very close friend of his and indirectly am engaged in business with him.

(Witness excused.)

H. S. HOUSE, recalled on behalf of the Government, on direct examination by Mr. Garrecht testified as follows:

I have made an examination of the books of the Crown Coal & Coke Company for the purpose of ascertaining the number of shares of stock disposed of by the Crown Coal & Coke Company.

MR. GARRECHT.—Q. How many shares were disposed of?

A.—There were 585,911 shares of treasury stock that was sold and there was 150,000 shares of treasury stock that was exchanged for 2000 shares of Crows Nest & Northern Railway stock, making a total of 735,911 shares that were disposed of.

MR. GARRECHT.—Q. Have you made an examination of the books of the International Development Company for the purpose of ascertaining the number of shares of Crown Coal & Coke Company stock that was disposed of by the International Development Company prior to January 1, 1912?

A.—Yes, sir.

MR. GARRECHT.—Q. How many shares were disposed of?

A.—They sold 1,240,658 shares for which the Crown Coal & Coke Company received \$206,036.00. That is for the entire sales of treasury stock. The International Development Company received from the sale of Crown Coal & Coke Company stock that was owned by them, \$398,682.52.

The minute book of the Crown Coal & Coke Company, page 21, admitted as PLAINTIFF'S EXHIBIT "125".

Pages 39, 40, 41, 42, & 43, of the minute book of the Crow's Nest & Northern Railway Company admitted

in evidence without objection as PLAINTIFF'S EXHIBIT "126".

Page 49 of the minute book of the Crow's Nest & Northern Railway Company admitted without objection as PLAINTIFF'S EXHIBIT "127".

MR. GARRECHT.—We now offer page 24 of the minute book of the International Development Company dated January 3, 1910.

The names of the officers read as follows:

R. G. Belden, President; James A. Williams, Vice President; A. E. Wayland, Secretary-Treasurer; of the International Development Company.

I have made an examination of the books to ascertain whether the 120,400 shares of Crown stock referred to in the Crow's Nest & Northern Railway minute book, page 49, was disposed of and have also made a computation showing the amount that was realized by the Crow's Nest & Northern Railway from the sale of this stock, which is \$60,200.00. I have also made a correct tabulation from the books of the corporation showing the date, pages and other details pertaining to this transaction.

This stock was sold through the International Development Company and I have made a computation showing the amount realized by the International Development Company from the sale of this 120,400 shares of Crown stock. The International Development Company received \$94,971.00.

MR. GARRECHT.—Have you made a computation to ascertain the rate of percentage of commissions that was realized by the International Development Company for the sale of the Crown stock?

A.—Yes, sir; Yes, sir, I have.

MR. GARRECHT.—Can you tell what disposition was made by the Crow's Nest & Northern Railway Company of the \$60,200.00 that it received from the International Development Company on account of the sale of the 120,400 shares of stock you have testified about?

A.—Yes, sir. \$50,000.00 of the \$60,200.00 that was received by the Crow's Nest & Northern Railway from the sale of these 120,400 shares was turned over to the Crown Coal & Coke Company in payment of an additional 100,000 shares of treasury stock. I have made a computation to show the rate or percent realized by the International Development Company from the sale of the stock that has been referred to.

MR. GARRECHT.—Q. What was the rate?

MR. WILLIAMS.—To which I have objected as incompetent, irrelevant and immaterial and not within any issue.

THE COURT.—He may answer.

(Defendants except and exception allowed.)

A.—A little better than thirty-six and a half per cent.

On CROSS EXAMINATION by Mr. Williams the witness testified as follows:

My age is pretty near thirty-two years. I am the officer of the Government who had charge of making the investigation before the indictment was returned here. I was engaged in that investigation from the 17th of April, 1913, until the 1st of October—that is, I was gone for about two months and a half and came back and stayed perhaps three or four weeks and was gone again and then came back and continued on it probably nine months altogether. During that time my work was nearly entirely confined to the office of these defendants. They voluntarily turned over to me everything in their office to go through and check over if I desired. The figures that I have given with reference to the stock of Crows Nest & Northern start from November 1st, 1910, in accordance with that resolution that was passed by the Crows Nest. There have been previous sales out of this trustee stock of 29,600 shares. During the summer and early fall of 1910 Mr. Belden and Mr. Wayland sold a large quantity of stock down around the Walla Walla district and perhaps over in Payette, but none of the proceeds that was derived from these sales went to the Crows Nest & Northern Railway Company. Messrs. Belden and Wayland or the International Development Company received up to the time of the completion of the organization of the Michel Coal Mines, Limited, for the two coal locations that were turned in by them, one million shares of the Michel

Coal Mines stock. The stock that went to the others, with the exception of this list that I have here, this stock was afterwards sold by the International Development Company, this list here, was all disposed of and something realized by the International Development Company from the sale of it.

MR. WILLIAMS.—I want to know how much stock they received upon this incorporation being completed?

A.—As I say, the entire million shares come to them and they disposed of it as they saw fit.

MR. WILLIAMS.—Q. You know at least, Mr. House, that out of that million shares that you were talking about one hundred thousand shares of it went to Butterfield?

A.—Yes, sir, for which he paid \$250.00.

Q.—5000 shares went to LaFrance?

A.—Yes, sir.

Q.—25,000 shares went to Dr. Byrne?

A.—This register does not show that Dr. Byrne ever owned any stock.

Q.—I am referring now to the minutes that are introduced here, Exhibit "13"?

A.—The minutes authorize them to be issued but there is no regular certificate issued to Dr. Byrne.

Q.—25,000 shares to O'Brien?

A.—No regular certificate issued for that.

Q.—100,000 shares to T. J. Penn?

A.—Yes, sir.

Q.—5,000 shares to E. A. Martin?

A.—Yes, sir.

Q.—10,000 shares to Baptiste Lamereaux?

A.—Yes, sir.

Q.—9,000 shares to Dwyer?

A.—Yes, sir.

Q.—100,000 shares to Hemphill?

A.—Only 25,000 of that issued to Mr. Hemphill, that is, regular certificate. There might have been an advance certificate issued for the entire amount, but the regular certificate was 25,000 shares.

Q.—Was there any issued directly to the International Development Company?

A.—As the International Development Company received the entire million shares and then disposed of it as they saw fit—

Q.—(Interrupting) But did they ever get a certificate for the entire million?

A.—No, sir.

Q.—It was issued to these other parties, these different parties?

A.—Yes, sir, but the records of the International

show that there was something received from the International for all the certificates except that list that I showed you there.

Q.—That is, something before the incorporation of the company.

A.—Yes, sir.

Q.—The stock ledger that is in evidence here, the only amount it shows the International ever received of the stock was 335,536 shares?

A.—Yes, sir, but that entry was made January 31st, 1907. During the year 1906 they had sold a large amount of stock that was not deducted from their million shares—just the balance they had left.

Q.—And there was this Penn stock and these other stocks that I have referred to?

A.—Yes, and a great many others.

Q.—Isn't it a fact that what has happened is you are referring to the question of the amount of sales that they had made, 936,532 shares, you have included in that all of the stock that these people got in the organization of the company; isn't that a fact?

A.—Yes, sir.

Q.—You have included in there the stock that Belden, Wayland, and the International Development Company purchased since the organization of the company and then sold?

A.—If they took the stock back.

Q.—Can you answer the question yes or no?

A.—Well, yes, but if they took the stock, if they made a deal—

MR. WILLIAMS.—I don't think the witness has a right to make an argument.

THE WITNESS.—I am explaining how I arrived at those figures, is all. If they made a sale of stock for, we will say fifteen cents a share, 5,000 shares and took a note for \$750.00 and then they cancelled that sale and gave back the man his note, I have taken that out as not being a sale; but if some man had bought stock and made part of the payments on the stock and then has become dissatisfied and turned the stock in and then they have resold the stock, I have included that in as two sales. I have included in that everything that they may have sold, where they may have got the stock by going out into the market.

Q.—You mean in order to protect the Michel market?

A.—I don't know anything about protecting the market. I have included everything in there that they have purchased. For instance, they took over some stock from the treasury. If they sold that stock at the same price that they paid for the treasury, I have not included that in my figures; but if they sold it for more than they paid, I have included the difference between what they paid and what they got in my total.

Q.—Notwithstanding that the difference would only have been the commission?

A.—No, it would have been more than the commission.

Q.—I say it would be notwithstanding that might be the case?

A.—It was not the case. I have deducted from my total sales the entire total of the stock that was turned over from the treasury. Maybe they would take over 25,000 shares of stock from the treasury. That would be issued to them and charged to their account on the Michel books. Then the International Company would give the Michel Coal Mines credit for the entire amount of this stock. Then at various times they would either advance money to the Michel Company to offset this or they would turn over notes. Now, perhaps that certificate that was issued to the International Development Company would be held by them for six or eight months or perhaps even longer and then they would proceed to sell the stock that was issued on this certificate. Now, I can't tell just where their treasury sales begin and where they end, unless you call the sales from these particular certificates treasury sales, which were made perhaps six or eight months later.

Q.—Well, how would you treat these transactions, as personal or treasury?

A.—Anything that was transferred from a certificate

that belonged to the International Development Company and did not come from the treasury, I have considered that personal stock.

Q.—In cases where these certificates had been delivered by the Michel Company and later accounted for by the Development Company?

A.—Yes.

Q.—You have treated it as personal stock?

A.—Oh, no, you misunderstand me. Any certificate that was transferred from the treasury of the Michel to the International Development Company and then sales made out, that certificate I have treated as sales of treasury stock; but anything that was transferred to the International Development Company from other sources and sales made out of these certificates, I have treated these as personal sales.

Q.—Now, the fact is that the books show that a total ownership, stock ownership in the Michel, leaving out the question of any stock in the organization of the company, that their holdings in the Michel have remained practically the same through all of these years?

A.—No, sir.

Q.—Has there been very much decrease in the amount?

A.—Here on January 8th, 1911, Government's Ex-

hibit No. "20", page 10, states that they owned certificate No. 307, for 335,536 shares.

Q.—And this \$28,138.75 received which you say the treasurer received from the sale of stock, that is the net amount, is it, after deducting the commissions?

A.—No, sir, that is the gross amount.

Q.—And the amount out of which the commissions are paid?

A.—Yes, sir.

Q.—These commissions that are spoken of, were generally on account of sales all through the district?

A.—Well, the Michel Coal Mines authorized the payment of a twenty percent commission to the fiscal agent, which was the Inland Surety Company, and afterwards the International Development Company.

Q.—You spoke something about the International Development Company having received \$85,699.24 on account of sales?

A.—Yes, sir.

Q.—You are not referring to cash, are you?

A.—No, sir, that is its entire receipts.

Q.—The fact of it is that the great bulk of it was either equities of some nature or kind or where there were trades or notes which have not been paid?

A.—There was twenty-seven thousand dollars of

that amount that was cash. They got in addition \$45,338.80 real estate and they got \$20,415.99 notes.

Q.—You also found from that investigation and in checking these figures that the International Development Company was carrying the Michel during these years—I mean advancing their own money to pay their payrolls and things like that?

A.—I found that during the year 1905 and '06, that was while they were selling this 120,000 shares of treasury stock at five cents, they advanced to the Michel Coal Mines \$3461.85; that during the year 1907 they disposed of about 70,000 shares treasury stock for them during that year and that they advanced them \$2216.00 in cash; and during the year 1908 they advanced \$865.64 in cash. In 1909 I didn't find any advance of cash. In 1910 \$216.50; 1911, \$28.96.

Q.—A general question now directed to all of them: You found the fact was that the International Development Company's cash account was continually overdrawn through all of those years—I mean with the bank, so far as they had any money?

A.—They had some money borrowed from the bank.

Q.—Well, you found that in general that was the condition, did you not?

A.—No, I found where they spent quite a bit of money in promoting the White Canyon Copper Com-

pany down in Utah, and also the Utah Land Company.

Q.—They did spend a little money outside of these companies?

A.—Yes, they did, and they drew down quite a bit of money each year for their personal expenses.

Q.—In other words during this period on an average, taking it on an average all told for expenses and everything else Belden drew all told, and that is all that he has ever got, something in the neighborhood of six thousand dollars a year, covering his expenses through the field, everything like that, and Wayland something in the neighborhood of four thousand dollars, just roughly?

A.—That is about right; yes, sir;—that is from the International Development Company.

Q.—Well, any salary that may have been paid by any of these corporations to Belden and Wayland went in the International Development Company, did it not?

A.—Yes, sir, that became an asset of the International Development Company.

(Whereupon an adjournment was taken until 2 o'clock P. M. March 27, 1914, at which time the trial was resumed and the following proceedings were had):

H. S. HOUSE resumed the stand and on cross examination by Mr. Williams testified as follows:

After the incorporation of the Crown the International Development and Belden and Wayland had on the 2nd day of January, 1907, 300,000 shares standing in their own name and 100,000 in the name of W. A. Hemphill, 50,000 in the name of L. Whitney and a pro rata of about 70,000 shares of the promoters' stock of 150,000 shares, making in all about 525,000 shares; and in addition to that they later on disposed of 100,000 shares that was issued in the name of Stephen Brown. Now, how they came in possession of that I do not know, but the stock that stood in their name or was controlled by them was about 525,000 shares. I think Mr. Hemphill had 25,000 shares of Crown stock when he withdrew from the International Development Company. At the time I made this report, on January 1st, 1912, there were 228,766 shares standing in the name of the International Development Company, 80,500 shares in the name of Mr. Belden, and 80,000 shares in the name of Mr. Wayland, and 10,000 shares in the name of Mr. Belden's wife. There would be a difference there of about a hundred thousand shares but in addition to this they have purchased from the syndicate holders quite a large amount of stock. They purchased a great deal more Crown stock than they did Michel. There was some stock that I remember of that was issued for labor on the property up there. There was no real estate in these transactions at all and about \$125,000.00

in notes and about \$75,000.00 in cash, the way I remember it. The figures that I have given in regard to the Crown sales included both cash and not sales and there was about \$125,000.00 of those sales note sales. In other words, there was \$74,592.35 in cash, \$124,311.75 in notes, and \$5,575.25 that is charged up for labor and salaries. The rest of it is charged to various accounts. I do not know how much has been realized from the notes. Very little had been paid on the notes up to January 1st, 1912.

Of the sales of the Michel stock that I charged to the International Development Company there was fifty thousand went to Butterfield on some kind of an arrangement and forty-five thousand went to Alboucq for which he paid something, taken back by the International Development Company; fifteen thousand went to Hart in lieu of commissions.

On REDIRECT EXAMINATION by Mr. Garrecht he testified as follows:

Mr. Belden drew six thousand and Mr. Wayland four thousand a year from the International Development Company and in addition to that they got two dividends.

Pages 30 and 39 of the International Development Company minute book read in evidence, also page 37.

I have made an examination to ascertain the amount of Crown stock disposed of between June 1st, 1910, and November 1st, 1910, and find that 254,817 shares

were disposed of, the proceeds of the sale having gone to the International Development Company. None of the proceeds went to the treasury of the Crows Nest & Northern Railway Company.

MR. GARRECHT.—Q. Now, in one of the questions counsel asked you if it was not a fact that the defendant traded real estate for stock put on the market in competition with these companies. Do the books show how much they acquired?

A.—Yes, they took over from the R. G. Belden Company 1000 shares of stock that they paid R. G. Belden Company—that is, they gave them credit on the International books, for one hundred dollars; then they took over 13,430 shares from the R. G. Belden Company for which they gave R. G. Belden Company credit for \$250.00; then they took over from J. P. Penn 5500 shares of Michel stock that was in part payment of fifteen shares of Crows Nest & Northern Railway stock; then they purchased 1000 shares from J. L. Ford for which they paid him \$12.25 cash and then they took over from Helen LaFrance 5000 shares in—then they secured from L. Albaugh 45,000 shares of stock; then they took over 10,000 shares of Michel stock from Dave Still in exchange for other stock; then they took over some more stock from the treasury. It is impossible to tell just what stock they owned on January 1st, 1912, or just where it came from. They were buying this stock and selling it all the time. Where they got the exact amount which they had on January 1, 1912, I can't say. None

of this 1912 stock came back from notes that were given and not paid.

The minute book of the Crown Coal & Coke Company, page 54, admitted as PLAINTIFF'S EXHIBIT "128".

MR. GARRECHT.—I offer page 25 of the Empire minute book, 56 of the Michel minute book, and Crown minute book, pages 38, 50, 66, 73, 117, and 126.

PLAINTIFF'S EXHIBITS "129" to "137" inclusive admitted.

MR. GARRECHT.—We offer the International Development Company minute book pages 25, 26 & 27.

MR. WILLIAMS.—To pages 25 and 26 we object as incompetent, irrelevant and immaterial and not within any of the issues of this case.

THE COURT.—I don't think it is very material. They may be admitted.

(Defendants except and exception allowed.)

PLAINTIFF'S EXHIBITS "138", "139" and "140" admitted.

On RECROSS EXAMINATION he testified as follows on the examination by Mr. Williams:

The dividend referred too on page 70 of the International Development Company, I ascertained was paid by checking through the books, that is, they

turned over to the individuals certain of this coal stock that the corporation held and certain of the notes that they had taken for the stock sales. They traded the notes off for Crown, Michel and Mills stock, and out of this transaction there was no question of money coming to them. The next dividend referred to on page 38 was simply shifting the stock from the corporation in to the individual names. The British Columbia Investment Company stock is the same, that is, really Crown stock. The Mills Syndicate coal mines stock was some coal stock in the same situation, right there (indicating), and that was shifting that. As far as cash coming to them out of that I do not know. They might have sold it after they got it in dividends. I don't know. The same is true of the real estate. I do not know anything about the Riparia Orchard tract valued in that dividend at \$45,000.00. Neither do I know in regard to the Pleasant Farms interest. I merely take their values that they put on the stuff. The stock that they sold between July 1st, 1910, and November 1st, 1910, 254,817 shares, was personal stock, that is, that was the Crown stock that was owned by the International Development Company. I have been unable to find that the Crows Nest & Northern Railway Company was keeping any books at that time. It is not a fact that the sale of stock that I have just referred to was for the Crows Nest & Northern and was passed immediately to them.

I am sure that none of the proceeds out of this sale went to either the Crown Company or the Crow's Nest & Northern. There were note sales, real estate

sales and some cash sales. There was 20,000 shares of stock that was sold and then that was sold to Mr. Hopson for \$7,500.00 in cash. None of the proceeds of this went either to the Crown or the Crow's Nest & Northern, to neither one of these companies. The item that I have referred to of \$7,500.00 of Mr. Hopson is not a part of a note of Mr. Hopsons.

(Witness excused.)

MR. GARRECHT.—We offer Sections 3, 7, and 12 of the articles of incorporation of the Empire.

The articles admitted as PLAINTIFF'S EXHIBITS "141", "142" and "143".

License No. 2621 admitted without objection as PLAINTIFF'S EXHIBIT "144", and License 2622 as PLAINTIFF'S EXHIBIT "145".

C. A. BRYAN, recalled as a witness on behalf of the Government, on direct examination by Mr. Garrecht, testified as follows:

My name is C. A. Bryan and I live at Prosser, Washington. At one time I sold stock in the Empire Coal & Coke Company as agent, for the International Development Company. As agent for the International Development Company, in selling Empire Coal Company stock I distributed this prospectus.

MR. GARRECHT.—We wish to offer it all in evidence and read only a part of it.

MR. WILLIAMS.—May I ask a question.

THE COURT.—Yes.

On EXAMINATION ON VOIR DIRE by Mr. Williams the witness testified as follows:

Q.—Mr. Bryan, who prepared the draft for this prospectus?

A.—That was prepared by—that is a part of it by myself and part by Mr. Wayland, and it was finished in Spokane.

Q.—And isn't it a fact that this was prepared entirely, a draft of it by yourself and Mr. Vincent and sent to Spokane?

A.—I don't think Mr. Vincent had anything to do with it.

Q.—You think not?

A.—No, sir.

Q.—Was it sent in typewritten or in longhand?

A.—Longhand, I think.

Prospectus admitted as PLAINTIFF'S EXHIBIT "146".

I received the letter which you show me, at the post office in Freewater, which was my post office address. I received it through the mails.

MR. GARRECHT.—I offer it in evidence.

The letter admitted in evidence as PLAINTIFF'S EXHIBIT "147".

It was about the first of September, 1909, that I entered the employ of the International Development Company. My duties were to sell stock in the Empire Coal & Coke Company. The only instructions that I received was simply repeating the statement that I heard made in the sale of stock, that is, statements made by Mr. Belden. His statements were that these properties no doubt contained the same veins of coal which were opened on the adjoining property, which was the Crown Coal & Coke Company, and that it was expected to be developed as shipping coal within a year from that time; that the railroad was chartered, the surveys made, the right of way cut, the right of way secured and it would be built in time to handle the output of the Empire Mine. In making sales of the Empire stock, some of the stock of the Crows Nest & Northern Railway was disposed of. The statements that I have just made were statements that were made by Mr. Belden at the time that we were making sales. We were working together at that time and these statements were made by him in that work, simply repeated; they were repeated by myself in many cases in his presence. I offered one share of railroad stock. He stated that the British Columbia government was such that it would not permit it to be short; that the full one hundred dollars had to go into the treasury of the company, that is, the treasury of the Crows Nest & Northern Railway Company. Later on I sold stock

in other companies. The letter which you show me I got through the mails at the post office.

MR. GARRECHT.—I now offer that in evidence.

The letter admitted in evidence as PLAINTIFF'S EXHIBIT "148".

MR. GARRECHT.—I now offer this letter in evidence.

The letter admitted in evidence and marked PLAINTIFF'S EXHIBIT "149"

MR. GARRECHT.—Q. I will ask you how you got that letter?

A.—Through the mails.

MR. GARRECHT.—I offer it in evidence.

Letter admitted in evidence as PLAINTIFF'S EXHIBIT "150".

MR. GARRECHT.—Q. Now, state under what circumstances was Crown stock to be used as bait?

A.—Well, it was conceded that the Crown was the most—

THE COURT.—The letter speaks for itself, unless he had some further conversation with the defendants.

Q.—Did you have any instructions from the defendants when you were to use the Crown stock, aside from the letters introduced in evidence?

A.—I can't recall just what the instructions were, more than that letter.

Q.—Were you an officer?

A.—Yes, I think I was a director in 1909.

Q.—Do you know who gave the instructions what was to be done on the property?

A.—These instructions were given practically by Mr. Belden. Mr. Belden engineered the work through.

(Cross examination had later.)

LNKE FAIRES, called and sworn as a witness on behalf of the Government, on direct examination by Mr. Garrecht, testified as follows:

My name is Luke Faires and I live at Port Angelas, Washington. I was at one time employed by the defendants Belden and Wayland, in 1909. My duties were those of stock salesman and I sold stock in the Mills Syndicate, the Empire and the Crown. I was given instructions as to what representations were to be made to purchasers of the Empire, by the defendants. They were to be in fact that the Empire was incorporated for a million and a half shares.

Q.—Did they say anything about the coal?

A.—Why, stated that the same veins practically laid under the Empire that laid under the Crown, as the property laid adjoining it, and the property looked to be as valuable as the Crown property only there

were not as many veins exposed on the Empire property.

The first million shares was to be sold at four cents a share to raise forty thousand dollars to pay off an option on the property. It was property adjoining the Crown property. They stated that the same veins practically laid under the Empire that laid under the Crown. We expected to raise some money by the sale of fifteen or twenty cent stock; we sold some stock, treasury stock to develop the property and then we expected to put the property in shape in eighteen months or two years, that is in shape for shipping.

Q.—Did you ever sell any stock after making these representations?

A.—Yes, sir.

Q.—Was there ever anything said about disposing of stock in the Crow's Nest & Northern Railway Company with any of this stock?

A.—Yes, sir. With every five hundred dollar purchase they was to receive one share of railroad stock par value of one hundred dollars, and the money was to go to the railroad company for the development of the railroad. I sold some stock as personal stock and other stock was sold as treasury stock. We sold both personal and treasury stock practically at the same time. Treasury stock was for the development of the property, and I do not know whether the certificates were issued from personal stock or treasury stock,

some real estate was taken in. Mr. Belden and Wayland represented that we could raise money on the real estate to develop the property; if we had to we could borrow money on the real estate. The deeds were most of them to Mr. Belden. He stated that doing that he would not have to call a meeting of the directors when he wanted to dispose of the property to get money to develop the properties with, raise money for the properties. I was one of the incorporators I think of the Empire. I had been working for the company. It was suggested to me by Mr. Belden. I had no monetary interest in the company. I understand that the right of way had been secured by the Crow's Nest & Northern Railway Company.

Q.—Did you sell any other stock in any company besides the Empire?

A.—Yes, sir.

Q.—When did you sell the Crown stock, were there any distinctions made between the Empire and Crown, as to which you were to sell; one or the other?

A.—Yes, to sell the Crown stock after I sold the Empire stock. There was times when I sold Empire and Crown together.

Q.—Under what conditions were you to sell Crown with the Empire stock?

A.—Well, they would rather have stockholders that was connected with one company own interest in the

other company, and I acquired stock in the Crown and Empire.

Q.—What did you give in payment?

A.—Commissions.

On CROSS EXAMINATION by Mr. Williams he testified as follows:

I reside at Port Angelas and at present I represent wholesale houses up in that north territory. I do not think I was a stockholder of the company at the time I was elected director. I cannot recall the directors by name now, all of them. I was acquainted with Mr. Vinson and Mr. C. A. Bryan, C. J. D. Knox, and J. B. Hartman, and W. J. Gorman and A. J. Poteet. I also knew Miss Covington who was acting as secretary. The instructions I received from Mr. Belden and Mr. Wayland was if possible with anyone thinking of buying, to get them to go up and look at the property. Practically every note that was given contained a provision something as follows: "The maker promises to visit the property within a certain number of months from this time and if he is not satisfied the notes will be surrendered." Something like that. I had instructions to endorse that on the notes. So far as possible I endeavored to induce them to go up and look over the situation fully, and did take up numerous people for that purpose. I was to receive twenty per cent commission and I think one fourth of that was taken out for expenses of the International Development Company. If Belden or Wayland were

working with me they took out their expenses, but if they were not working with me they didn't get any part of my commission at all. I have turned over to the Government all the letters that I received from Belden or Wayland. I do not have a letter from them bearing date July 12th, 1909.

MR. WILLIAMS.—Have you that letter?

A.—My letters or instructions—I have no letters to turn over to them.

I did receive some letters from Belden and Wayland. I received the letter which you show me a copy of, dated July 12th, 1909, and it was signed by one of these parties, Mr. Belden, if I remember right.

The letter admitted in evidence and marked DEFENDANTS' EXHIBIT "151".

I had made sales before the receipt of that letter. I followed those instructions about making no misrepresentations. I did not represent that I was selling personal stock as treasury stock. I took the parties that were taken to these properties from time to time all over the property and showed them everything about it and what the companies were doing, and showed them the lay of the ground. There was a tunnel being driven, I am referring to the Empire property. Mr. Bell had charge of the work at that time. That was under the charge of Mr. Bell at that time. I would take the investors into the tunnel to show them what we were working at. I did not at any time

represent to them that this was proven coal ground. I remember receiving a letter like the one you show me.

MR. WILLIAMS.—I offer in evidence the letter in question that came from the International Development Company.

The letter admitted in evidence without objection marked DEFENDANTS' EXHIBIT "152".

I knew when I was selling this stock that they were not going to get the proceeds from the sale of the personal stock and give the money to the company. I have made some trades or sales of treasury stock for real estate but I cannot locate just exactly the deal. I would swear that I did not make a trade of treasury stock for real estate. The representations that were made by Belden and Wayland to me were as to the size of the corporation, and that it adjoined the Crown property, and that Belden thought that the same veins were underlying the Empire as were under the Crown, and to him the property looked to be as valuable, acre for acre, as the Crown. He told me that he thought they would be able to operate in eighteen months or two years or before but that it depended upon their being able to get the railroad in. They couldn't develop the property until they got the railroad in. Besides this letter, there were statements made to us at various times by Mr. Belden in reference to one share of railroad stock being given for every five hundred dollars worth of shares of Empire; and that was the statement I was making to investors, that I would

give them one share of railroad stock with the purchase.

I received the original of this letter which you hand me.

The letter admitted in evidence and marked DEFENDANTS' EXHIBIT "153".

I also received this letter which you show me.

The letter admitted in evidence and marked DEFENDANTS' EXHIBIT "154".

About the same time as receiving Exhibit 154 I also received a letter something like this which you now show me.

The letter admitted without objection marked DEFENDANTS' EXHIBIT "155".

I also remember seeing a letter something like that.

Letter admitted in evidence marked DEFENDANTS' EXHIBIT "156".

On REDIRECT EXAMINATION by Mr. Garrecht he testified as follows:

I also received a letter like that to which Mr. Belyden's name was signed.

MR. GARRECHT.—I offer it in evidence.

MR. WILLIAMS.—I object to it as incompetent, irrelevant and immaterial.

THE COURT.—It will be admitted.

(Defendants except and exception allowed.)

Letter admitted in evidence and marked PLAINTIFF'S EXHIBIT "157".

MR. GARRECHT.—Q. Was any amount of the five hundred dollars that was received for the Empire stock and the railway stock together, was it to go to the Railway Company?

A.—One hundred dollars.

(Witness excused.)

ADA J. GILES, called and sworn as a witness on behalf of the Government, on direct examination by Mr. Garrecht, testified as follows:

My name is Ada J. Giles, and I live in Spokane. I did not at any time during the month of July, 1908, make any location of a mining claim in British Columbia, but I did know of one having been located in my name, having been told about it by Mr. Belden.

MR. GARRECHT.—Q. What did you receive, if anything, for the making of this location?

A.—Five hundred shares of stock in the Michel,—no, I guess it was in the Mills Syndicate instead of the Michel.

Q.—Did you receive any money?

A.—No, sir.

(Witness excused without cross examination.)

MRS. JOHN GILL, called and sworn as a witness

on behalf of the Government, on direct examination by Mr. Garrecht, testified as follows:

My name is Mrs. John Gill, and before I was married it was Alice Cope. I did not at any time in July, 1908, locate a mining claim in British Columbia. I cannot remember when I first found out that a location had been made.

MR. GARRECHT.—Q. What did you receive for the use of your name?

A.—I received five hundred shares of the Mills Syndicate coal.

Q.—Did you get any money?

A.—No, sir.

(Witness excused without cross examination.)

BAPTISTE LAMEREAUX, recalled on cross examination by Mr. Williams, testified as follows:

I have some of the letters I received from Belden and Wayland lately, but do not think I have any I received in 1909. I did, however, receive letters from them during that time. I cannot fix the time when Wayland was up there and told me not to say anything about where the lines was.

I received a letter something like the one you have just read me.

Letter admitted in evidence and marked DEFENDANTS' EXHIBIT "158".

I showed the lines correctly to Mr. Dimmick. The

time that I talked with Mr. Wayland was after the receipt of this letter and at that time I thought I knew where the lines of the Empire were. Mr. Dimmick is the one who started the work on the property, and he started it after I had pointed out the lines to him, in response to this letter.

(Witness excused.)

H. S. HOUSE, recalled as a witness on behalf of the Government, on direct examination by Mr. Garrecht testified as follows:

I have made an examination of the books of the Empire Coal & Coke Company and the International Development Company for the specific purpose of ascertaining the number of shares of Crows Nest & Northern Railway stock that was purchased by the Empire Coal & Coke Company. I find that they purchased ninety-seven shares from the International Development Company for which they paid \$9,700.00. My examination does not disclose that the one hundred dollars or any portion of the one hundred dollars for each share of stock went into the treasury of the Crows Nest & Northern Railway Company. I have also made an examination of the books of the Empire Coal & Coke Company for the purpose of ascertaining the number of shares of treasury stock that were disposed of prior to January 1st, 1912, and find the same to be 175,021. I have also made an examination of the books of the International Development Company for the purpose of ascertaining the number of shares

of Empire Coal & Coke Company's stock that the International Development disposed of prior to January 1st, 1912, of their personal stock and find the same to be 1,377,036 shares. The Empire Coal & Coke Company received from the sale of the 175,021 shares of treasury stock \$43,896.65. The International Development Company received from the sale of the 1,377,036 shares of personal stock in the Empire Coal & Coke Company \$163,479.78.

On CROSS EXAMINATION by Mr. Williams he testified as follows:

MR. WILLIAMS.—Q. Mr. House, upon the organization of the Empire is it not a fact that the only stock retained by the International Development Company, Mr. Belden and Mr. Wayland was 128,005 shares in the International Development Company's name?

A.—25,000 in Mr. Belden's name and 25,000 in Mr. Wayland's name. This certificate that was in the name of J. B. DuVall for 100,000 shares was disposed of by the International Development Company at a later date. I was unable to find where they ever paid Mr. DuVall anything for that or where Mr. DuVall paid them anything for the 100,000; but at later dates there were transfers from this certificate and the proceeds of those sales came into the International Development Company, that is all the books show, that was standing in their name at the time of the organization of the Empire Coal & Coke Company, and at

that time was all the stock they owned on the books, in their names. Prior to that they had sold approximately—

Q.—(Interrupting) I am not referring to prior to the incorporation. That was the stock, prior to the incorporation, that was the stock that was divided between the incorporators, or the organizers?

A.—I wouldn't say the incorporators, no, the organization I would call the same as the incorporation; it was the custom of Mr. Belden and Mr. Wayland to sell stock along in the latter part of 1908 and the early part of 1909 and give a receipt for so many shares or stock, give a receipt for so many shares of stock in a corporation to be organized.

Whereupon an adjournment was taken until April 28th, 1914, and thereafter court duly convened; present as before.

H. S. HOUSE resumed the stand and on cross examination being resumed by Mr. Williams, testified as follows:

Q.—And this question of personal sales that you have referred to that Belden and Wayland made the commissions, were paid out of that, were they?

A.—Yes, sir.

Q.—Commission of twenty percent or twenty-five or what?

A.—Commission on the Crown?

Q.—No, I am referring to the Empire!

A.—They paid a commission of twenty-five percent on the Empire and I think at the very beginning they paid a commission of thirty percent. They paid a commission of twenty percent on the Crown and twenty percent on the Michel, and then later on I think they paid twenty-five percent on the Michel. There were some made through the agents, on which there was no commission paid; they never closed the sales; the one that I am thinking of specifically was where they traded some Empire and Crown stock to Mr. Brainerd down in Payette for some land. The Journal says it is a J. B. Gorton sale. I was not able to find where any commission was paid on that sale; that is the only one I have in mind right now.

Q.—So, assuming for the sake of the argument that in these different sales that they realized these figures that you spoke of, the commissions that they paid came out of them?

A.—Yes, they paid their own commissions or paid their agents a commission out of that.

Q.—Now, in reference to this Empire, these sales of Empire that you refer to which you say shows that they realized \$163,479.78, you know as a matter of fact that there was very little in cash realized on that, don't you?

A.—About thirty-nine thousand dollars in cash, all told.

Q.—Now, on the question of treasury stock, as I understand you to say the agents in the field were getting all of the commissions?

A.—All of the commissions—yes, the agents in the Empire sales, for instance, the agents got twenty-five percent commission and the company got only twenty percent; that is, the International Development Company only got twenty percent from the Empire.

Q.—That is a loss of five percent?

A.—Yes, on treasury sales it was a loss of five percent.

Q.—In other words, the only commission that was allowed by the Empire was twenty percent while they paid the agents twenty-five percent.

A.—Yes, I never could figure out just why they were

Q.—Now, with reference to these railroad shares wileling to do that, but that is a fact.
that you say were purchased by the Empire, I believe you say the International Development Company received \$9,700.00 for them?

A.—Yes, sir.

Q.—The fact is, Mr. House, that of these 97 shares that you referred to 93 of them were shares of railway stock that were given before the Empire was incorporated?

A.—Something like that, these railroad shares were all got after the railroad was incorporated. My records show the date of the certificates of the railway stock. It shows practically all of these certificates were issued after the incorporation of the Empire Company. My records here, Mr. Williams, show that there were fifty-four of these certificates that were issued, given with stock that was purchased at fifteen and twenty-five cents. Now, the rest of that was given out with stock that was purchased at four cents, if that is the stock that you mean, prior to the organization of the company. The entire ninety-seven shares was purchased by the Empire after the organization of the Empire Company.

On REDIRECT EXAMINATION by Mr. Garrecht, he testified as follows:

Q.—Mr. House, how much of the organization, or rather the one million shares of stock that went to the International Development Company from the Empire stock stood in the name of the International Development Company or either of these defendants on the first of January, 1912?

A.—On January 1st, 1912, there was 32,564 shares that stood in the name of the International Development Company. There was no stock in Mr. Wayland's name at that time and there was 17,900 shares standing in Mr. Belden's name. That would make about 50,500 shares.

MR. GARRECHT.—Now, Mr. House, for the

stock that was issued, the shares of stock that was issued to the people whose names were on the list that was turned over at the time the transfer was made of the claim, to the various companies by the International Development Company, with the request that stock be issued to these different individuals, did anything of value go to the treasury of the corporation for these shares?

A.—Of what corporation? There was nothing of value went into the treasury of the Empire Coal & Coke Company The proceeds from the sale all came into the International Development Company

RECROSS EXAMINATION by Mr. Williams:

Q.—The stock of the corporation, that is, the stock of the corporation was paid for by that transaction?

A.—Yes, by turning over two coal leases for this property up there.

(Witness excused.)

WILLIAM C. HOPSON, called and sworn as a witness for the Government, on direct examination by Mr. Garrecht testified as follows:

My name is W. C. Hopson and I live near Milton, Oregon, where I have a fruit ranch. At one time I bought Empire stock and Crown stock. I talked with Mr. Belden before I bought the Empire stock but I never talked to Mr. Wayland until after I bought the Empire stock. I talked to both of them before I bought the Crown stock. These conversations con-

cerned the properties. Mr. Belden said, when he was trying to get me to buy the Empire stock, that they held—some parties held an option or owned the Empire and they held an option on the Empire. We was to buy the stock in the Empire and take up that option that they held on the Empire and buy the properties, and the property was represented—we were buying the stock to pay for the Empire property and it was—we always understood we were getting the title to the Empire property. We wasn't buying out leases or anything of the kind; we were buying the property outright, as to the value of the property, he said that the timber on the property was worth the amount we were paying for it and with each five hundred dollars worth of stock we took we were to get a share in the railroad company, and that was to go towards building the railroad, so we could have transportation facilities to get the coal out, when we got to mining. I bought \$250.00 worth of stock the first time and \$500.00 the second time and dgave my notes and paid the notes.

The \$250.00 was to go towards buying the option that they held and the \$500.00 was to go towards developing the property and putting it in working order, except \$100.00 was to go into the railroad fund. That was to be paid into the railroad in cash, and of course I understood—. The one hundred dollars was to be paid in cash to the railroad company as the Canadian Government had control of all railroad properties and for every—all the money that went

to the railroad had to be turned in in cash and could not be spent except under the supervision of the Canadian Government.

Q.—Where did you see Mr. Wayland?

A.—I don't remember that I saw Mr. Wayland until the meeting in Freewater, in the winter of 1909-10.

Q.—Well, did he say anything about this property?

A.—Yes, sir; he had several maps and made a long talk on the value of the property and the way—he called it a geological talk and the maps on the wall, he showed how the Crown mountain had dipped, or the Empire had dipped down or had broke off from the Crown, and by going in on the Empire how he would strike the veins of coal that had broken off from the Crown mountain into the Empire and there was no question about the coal being there; and Mr. Belden also stated that there was no question about the coal being in the Empire. He said one of the engineers said the coal in the Empire—well, this was about the way he said—he asked the engineer as a matter of information to find out what the engineer would say, “What do you think of the coal in the Empire property,” and the engineer answered “Any damed fool would know that there was coal in the Empire.” Mr. Wayland's talk was to carry out these statements that Mr. Belden made, showing that the geological formation of the land and the properties there was such that there couldn't be any question

but what the statements were true; and he also had a blue print of the railroad and the right of way. I suppose it must have been eight or ten feet long possibly, up on the wall, showing how they would build the railroad and the grade and there would not be much expense about fixing up the road and building it and that there was timber enough on the right of way and clearing the right of way to furnish ties and possibly enough for bridge timbers for what few bridges there would be; there would not be many bridges, but what few there would be. The blue print showed the right of way and that there was slashing on it. I can't say the exact words, but he had the blue print up there and says, "This is our right of way" and told all about what was necessary to build the road and what the grade would be and always talked about "our" railroad. The first time I bought two thousand shares of Crown, and the next time three thousand and the next time five thousand, and I paid between \$4000.00 and \$4250.00.

Q. Did you get any railroad stock?

A.—Yes, sir, one share.

On CROSS EXAMINATION by Mr. Williams he testified as follows:

The conversation which I have referred to at this meeting, at which Belden and Wayland was present, the meeting was held in Vinson's office in Freewater. I think at that time Vinson was president of the company and lived in Freewater. I don't remember as to

all of the trustees resided in that vicinity or not at that time. So far as I can remember Mr. Vinson is the only one. At the meeting to which I refer there was probably twenty people in attendance, which included stockholders of the Empire and at that time there was also a very few who were stockholders in the Crown.

I am the same W. C. Hopson who was appointed one of an auditing committee to audit the books of the Empire but we did not audit or go over them because Mr. Belden said they were not in shape at that time to be audited so it ran along indefinitely and it was finally dropped. That is, he told us that the books had not been brought up or something of that kind. Some way, he was not ready just at that time to have them audited. I was never a director or trustee of this company.

(Witness excused.)

C. A. BRYAN, recalled for cross examination by Mr. Williams, testified as follows:

In reference to Exhibit "146", the proof for this prospectus, as I said yesterday it was prepared in Mr. Vinson's office at Freewater by myself and Mr. Wayland, and it was sent in to the Spokane office and compiled. I do not know if there was anything done in the Spokane office except to have it printed and I do not know whether there were any changes made in it at all. I know that the International Development Company's name never appeared in connection

with this booklet except as fiscal agent. Mr. Vinson did not help to prepare it.

I received the letter which you now show me.

The letter identified by the witness admitted as DEFENDANTS' EXHIBIT "159", and another letter admitted in evidence without objection as DEFENDANTS' EXHIBIT "160".

The Mr. Evans referred to in Exhibit 160 is the man that the people at Freewater sent up to investigate the property for them.

The circular letter admitted in evidence without objection as DEFENDANTS' EXHIBIT "161".

Another letter admitted without objection as DEFENDANTS' EXHIBIT "162".

Another letter admitted in evidence without objection as DEFENDANTS' EXHIBIT "163", and another also admitted in evidence as DEFENDANTS' EXHIBIT "164".

MR. WILLIAMS.—The letter of June 16th, that you refer to there, is that this letter that is marked Defendants' Exhibit 161?

A.—Yes.

Whereupon DEFENDANTS' EXHIBITS "165" to "174" inclusive, were admitted without objection and upon redirect examination PLAINTIFF'S EX-

HIBITS "175" to "178" were admitted without objection.

(Witness excused.)

H. S. HOUSE, recalled on behalf of the Government, on direct examination by Mr. Garrecht testified as follows:

I have examined the books of the various companies for the specific purpose of ascertaining who owned the certificates the stock which was purchased by Mr. Hopson was transferred and found that all the Empire stock that Mr. Hopson purchased was transferred from certificates that were owned by the International Development Company and that the proceeds of that stock did not go into the treasury of the Empire Company. Of the Crown stock that he bought, there was 2000 shares of that that was transferred from a certificate that had been previously taken over from the treasury of the Crown Company at twenty cents a share. The Crown Company got the benefit of about \$400.00 out of that transaction. The rest of the Crown stock that Mr. Hopson purchased was transferred from certificates that were owned by the International Development Company.

In reference to the railroad stock acquired by him, none of the proceeds went into the treasury of the railroad company but went to the International Development Company.

(Witness excused.)

JOHN S. VINSON, called and sworn as a witness on behalf of the Government, on direct examination by Mr. Garrecht, testified as follows:

My name is John S. Vinson and I live at Milton, Oregon, but my post office address is Freewater. I was president of the Empire Company during 1910, I think, and a part of 1909 possibly, and had acquired my stock from Mr. Belden prior to that time. Mr. Belden said that the Empire property was a very valuable property; it was valuable for coal and for timber. I bought 25,000 shares and paid four cents a share, paid one thousand dollars for it.

MR. GARRECHT.—Q. How did you pay the amount, in notes?

A.—In checking on the bank, cash.

Q.—Now, just state what representations were made to you by Mr. Belden concerning this property and what was to be done with your money, if he said anything about that?

A.—He said that they had an option on 1240 acres of coal lands; that they were to pay forty thousand dollars for that option, and the time was about up when they should make good; and they were selling this stock at four cents per share until they raised that forty thousand dollars and then it would immediately increase in value as the property was adjoining the Crown property and was easily—was of equal value to the Crown and had cuts to show the veins of coal in

the Crown and that these veins extended through the Empire.

I was shown samples of coal and we sent a man up there along with Belden to show him the property before we bought. He showed him the property and he brought down two sacks of coal that they said they got off the Empire, Mr. Belden said that. He also said that they had a railroad franchise by an act of parliament, that the road was surveyed and was very valuable, probably more valuable than the coal, or of equal value, and it was a good investment—that the stock was a good investment. In regard to these various coal companies getting together, he said that they operated separately at the present time but expected to consolidate all the companies at some future time.

While I was president I simply signed the checks, that is all, and presided at a meeting or two.

MR. GARRECHT.—Q. Who did have the management of it, if you know?

A.—Mr. Belden and Mr. Wayland. I did not have anything to do with getting out the pamphlet on the Empire. I got two shares of railroad stock and they said in regard to it that there was one hundred dollars for each share that had to go into the treasury of the railroad, in money; they had to put that into the railroad, that the railroad was incorporated in Canada and the Empire was incorporated in Washington, and that the railroad was valuable property and that would be the first thing—would have to complete the railroad,

and they had ties enough on the ground and on the right of way for building the railroad. The said they had the right of way, they owned the railroad right of way, they had an act of parliament that gave them the right. There might have been a few proxies made out in my name to represent people at some meeting, I believe there was.

On CROSS EXAMINATION by Mr. Williams he testified as follows:

He said that they had an act of parliament giving them power to build a railroad, I understood that they owned it; he said that they had the right of way. I was on the property once in 1909, after I purchased my stock. While there I looked over the entire situation as well as I could. I went over what they said was the Empire. There was no work whatever being done there at that time; they had not started yet. There had not been any tunneling done on the Empire. We sent Mr. Evans up to look at the property before I bought and I don't know whether any one told me whether there had been any tunneling done or not. Mr. Belden told me that this coal which was brought down came from the Empire but did not tell me exactly on what part of the Empire it was obtained. I do not remember that he told me that they had found any veins on the Empire. I think what they said was that it was simply some float coal that was picked up on it.

MR. WILLIAMS.—Q. Didn't tell you though

that there was any coal in place that had been discovered by them?

A.—They claimed that there was coal property.

The witness identified and it was admitted without objection, a letter marked DEFENDANTS' EXHIBIT "179". The witness identified as having received a letter marked DEFENDANTS' EXHIBIT "180" admitted without objection.

MR. WILLIAMS.—Q. Now, with reference to this stock that you purchased, you knew at that time that that stock was not purchased for the company, that is, it was not going into the treasury, the purchase price?

A.—The first piece that I bought from Mr. Belden was to apply on this option.

Q.—I say, did they ever interfere with anything you ever tried to do as a board?

A.—I think possibly they have. In the election of officers, they simply controlled the whole matter. My understanding all the time is that they had proxies at all these meetings and elected the board of directors.

Q.—When you spoke of Belden and Wayland having the management, just what do you mean, Mr. Vinson?

A.—Simply that there was nothing done without they did it. Nothing all the time.

Q.—Neither Belden or Wayland were trustees at any of these times, were they?

A.—They held the voting stock. The majority of the board voted with them all the time.

Q.—They were not on the board of directors?

A.—I wouldn't say for certain. I would not trust my memory to say that they were not.

Q.—They did not interfere with the board doing whatever they wanted to, did they?

A.—Not worth while for anyone to try to do anything.

Q.—Did you send your proxy to them?

A.—Yes, sir. They did not control me in sending in their proxies.

On REDIRECT EXAMINATION he testified that Belden & Wayland sent out these blank copies to every man they knew of, and also sent out blank powers of attorney.

On RECROSS EXAMINATION witness identified a letter which was marked DEFENDANTS' EXHIBIT 181, and afterwards another letter identified by the witness was admitted in evidence and marked "182".

(Witness excused.)

JOHN NIEDERER, a witness called on behalf

of the plaintiff, being first duly sworn, testified as follows:

DIRECT EXAMINATION by Mr. Garrecht:

My name is John Niederer, I live at Summerville, Oregon, am a farmer. I have stock in the Crown and Empire.

Q.—Before you purchased stock did you have any talk with either Mr. Belden or Mr. Wayland?

A.—No, sir, not the first lot.

Q.—Well, did you purchase any stock after having a talk with them at any time?

A.—Yes, sir.

Q.—Well, state what was said to you about these properties, did you talk to both of them?

A.—First I talked with Mr. Hopson, I think, A. Hopson. The first talk I had with Mr. Belden was when he came down in January, 1911. He called a meeting at our school house, Dry Creek school house.

A.—There is where he explained about the properties. He stated that he came down there with the intention of raising some money for to put in a railroad to these properties, to the Crown property. He said everything was already then but the railroad for to go to work and take out coal; said there was lots of coal in sight, you might say in both the Empire and the Crown. The Empire was a little harder to get at.

They were working on a tunnel, they had four hundred feet of tunnel built towards the Empire.

Q.—Now, after that did you buy any more stock?

A.—Yes, sir, I did. I bought five hundred dollars worth, gave a note for five hundred dollars, and paid it.

Q.—I show you a letter, Spokane, Washington, January 18th, to you, John Niederer, Summerville, Oregon, signed International Development Company, per R. G. Belden. I will ask you to state how you got that letter?

A.—Through the mail.

MR. GARRECHT.—I offer it in evidence.

The letter admitted in evidence without objection and marked PLAINTIFF'S EXHIBIT "183", and was read in full to the jury.

MR. GARRECHT.—Q. Did you get your note back or did you take up stock?

A.—I took up some more stock.

Q.—or the same notes that you permitted them to hold?

A.—Yes, I couldn't say how many shares for sure; I got part of the Crown and part of the Empire.

MR. GARRECHT.—Take the witness.

CROSS EXAMINATION by Mr. Williams:

I made my first purchase of Empire the last of

December, 1910, and in the Crown the same date. Mr. Belden was in our section the 7th or 8th of January, 1911. The first time I saw Mr. Belden was sometime after I purchased stock. When I talked to Mr. Belden a lot of the neighbors were present. Mr. Mat Sanderson was one. A. Hopson was with Mr. Belden, and was there when this conversation was had, and heard what took place.

WHEREUPON an adjournment was taken until 2:00 o'clock P. M. and court thereafter duly convened, present as before.

He stated that he had some coal stock to sell, and by making us understand he put up a chart on the wall at the school house. All the statements that were made by Belden were made at that meeting. He explained about the tests of the coal, what it tested, and about the size of the vein. In reference to the Empire as to what Mr. Hower had told him in reference to the coal being there, Mr. Hower said it was a part of the Crown mountain; it broke in two and slid down; it was principally the same vein as on the Crown. His statement was that the west side of the Empire had dropped down, and these coal veins in the Empire would be struck by running a tunnel into the mountain, while on the Crown the veins were exposed to the break.

Leo R. Niederer is my son and lives in my home.

Q.—Look at this letter and state whether that was written at your suggestion?

A.—Yes, sir, I instructed my son to write it.

Q.—Did you sign it after it was written?

A.—Yes, I had it written about the date it bears.

MR. WILLIAMS.—I offer this letter in evidence.

THE COURT.—Read the letter.

The letter admitted in evidence and marked DEFENDANTS' EXHIBIT "184" and read to the jury.

REDIRECT EXAMINATION by Mr. Garrecht:

Q.—Did you pay this note again the second time?

A.—Yes, sir.

Q.—Do you know how much you paid altogether to the International Development Company?

A.—Pretty close to fifteen hundred dollars.

(Witness excused.)

WALTER J. WOOD, recalled on behalf of the plaintiff, testified as follows:

DIRECT EXAMINATION by Mr. Garrecht.

Q.—Mr. Wood, in which of these coal companies did you have stock?

A.—I had in the three of them, the Crown, the Empire and the Michel.

Q.—Now, before you bought your stock did you have any talk with either Mr. Belden or Mr. Wayland?

A.—Yes, sir.

Q.—Did they make any statement about these properties which induced you to buy?

A.—Yes, sir.

Q.—Well, state what was said by them?

A.—I went to the property with Mr. Wayland. He showed me the property at Crows Nest, beginning at the Canadian Pacific Railway. We followed up the creek, he showed me the right of way of the railroad.

MR. GARRECHT.—Q. What did he say about that?

A.—He said they owned seventeen acres on the Canadian Pacific Railroad for yard ground.

THE COURT.—What did he say about the right of way question?

A.—He showed me the right of way, where the road was to be built; showed me one place where they had cleared some timber off, another place where they were to cross the Michel claim, and we followed the general course of the right of way on the property, and then after getting to the Crown property, we rode over the Crown mountain, and on into the Empire property, that was represented to be into the Empire property, showed me veins of coal that were opened up on the Crown and the tunnel in the Empire.

MR. GARRECHT.—Well, where did you buy your stock?

A.—I bought it in the International Development Company's office except one thousand shares of Empire I had bought before I went to look at the property.

Q.—Well, was anything said either way when you bought your first stock, by either of the defendants, or at the time you purchased the stock at the International Development Company's office in Spokane, about what would be done with the money?

A.—It would be used for developing the property. They represented to me that they had sufficient funds to build the railroad, but there was other improvements that would have to be made to put the property in shipping condition.

Q.—Well, did they say what was to be done with your money?

A.—Why, it was to be used for this development.

Q.—Which ones?

A.—Well, building of the Tipple for one thing.

Q.—What did you give for the stock that you got?

A.—Well, the one thousand shares of Empire that I purchased before going on to the property, I paid cash for, and the balance I gave notes for.

Q.—Did you give any farm lands?

A.—No, sir, but they were to take farm land providing the land suited them. They came to look at it and turned it down.

Q.—Was there any understanding about that at the time the note was given?

A.—Yes, sir; they were to take the land if it was as I presented it.

Q.—I show you a letter dated Spokane, Washington, January 21, 1911, Mr. Walter J. Wood, Waitsburg, Washington, signed International Development Company, by A. E. Wayland, I will ask you, Mr. Wood, how did you get that letter?

A.—I got it through the mails.

MR. GARRECHT.—I offer this letter in evidence.

MR. WILLIAMS.—To this offer we object as incompetent, irrelevant and immaterial, as to each of the defendants; and make that as to both defendants, jointly and separately.

MR. GARRECHT.—That is the letter set forth in the indictment.

THE COURT.—It will be admitted.

The letter admitted in evidence and marked PLAINTIFF'S EXHIBIT "185" and read to the jury.

MR. GARRECHT.—Q. Mr. Wood, to whom were the notes made out that you gave at the time you purchased the stock?

A.—To R. G. Belden.

Q.—Did he say anything about that?

A.—Well, before signing the notes I asked him why they were made to him and he said they were selling the stock on a commission basis, that is the International Development Company was selling it on a commission basis and he was president of the company, and he took all notes in his name and they afterwards settled with the separate companies.

MR. GARRECHT.—I now offer the Empire minute book, pages 29 and 30, to show the passage of this resolution and wish to read it.

The minute book admitted in evidence and marked PLAINTIFF'S EXHIBIT "186".

CROSS EXAMINATION by Mr. Williams:

It was sometime in October, 1910, I visited the properties. Mr. Still and Mr. Wayland went with me. I made trip from Crow's Nest and back to Crow's Nest the same day. Went over the Empire where the cabins were, and over the Crown. Examined the coal formations on the Crown and went into the Empire tunnel, and examined the formation in the tunnel. Bought this stock the following day after I returned to Spokane at the office of the Company. Mr. Belden, Wayland and Mr. Still, and Mr. Livingston was there part of the time. He, (Belden) said that they had the necessary funds and security for building railroad. He told me, he had made arrangements with the Bank of Montreal to use these notes as collateral, to borrow money; said that he had estimate on what railroad would cost. When I was up

there the right of way had been partially cleared. It was what we term a slashing, the timber was mostly laying there on the ground; it was slashed for perhaps two hundred yards. They were to start work as soon as they could get in there the following spring. Belden said the proceeds from the sale of these notes was to be used for the building of the Tipple, equipping the mine to ship. He said they was selling the stock for the purpose of getting the funds to build these, and he was selling this stock for that particular purpose.

Q.—Is that your signature, Mr. Wood?

A.—Yes, sir. I signed that the date that I bought the stock but that last clause wasn't on there when I signed it. I know it wasn't because we talked about the stock. We had been talking about the development of the property and I know enough to know if I was buying his personal stock it would not help the company. I know I wouldn't have signed it if it had been there; I read it over.

MR. WILLIAMS.—I offer in evidence the receipt.

MR. GARRECHT.—No objection with the explanation.

The receipt admitted in evidence and marked DEFENDANTS' EXHIBIT "187" and read to the jury.

MR. WILLIAMS.—Mr. Wood, suit was brought against you on these notes, was it not?

A.—Yes, sir, and I set up this same defense that it was represented to me it was treasury stock. Case came on for trial at Walla Walla. I never appeared against them; I discharged my attorney and let them take judgment. The case was set and I was in Walla Walla to try the case at that time.

REDIRECT EXAMINATION by Mr. Garrecht:

Well, I wasn't financially able to go further. I told Mr. Reynolds to go down and notify the court I had withdrawn my defense and I owe my attorneys yet for the work they did do.

(Witness excused.)

H. S. HOUSE, recalled on direct examination by Mr. Garrecht, testified as follows:

I have examined the books of the Crown, Michel, and Empire to ascertain where the stock purchased by Mr. Woods was transferred from, and find that all the Crown stock purchased by Mr. Woods was transferred from the certificates that were owned by the International Development Company; and also the Empire.

(Witness excused.)

E. C. S. BRAINERD, called and sworn as a witness on behalf of the Government, on direct examination by Mr. Garrecht, testified as follows:

My name is E. S. C. Brainerd and I live at Payette, Idaho, and I put in most of my time looking after my

own interests. I never personally acquired any interest in any of these coal companies but a corporation of which I am a stockholder and director and secretary acquired some stock in the Empire and Crown. I had conversations with either Mr. Belden or Mr. Wayland in reference to these properties after I purchased the stock. They gave me an option on 20,000 shares of Empire and 10,000 shares of Crown, agreed to pay my expenses if I would go up and look over the property. The option carried also the agreement that I might exchange part of the Empire for Crown later on if I desired to. I made a trip over to the property. I came to Spokane and spent part of one day in the office and went from there with Mr. Wayland over to the property. We went from Crows Nest horseback. As we go out where we left the Canadian Pacific line he commenced to show me the right of way of the Crows Nest & Northern Railway and showed me the clearing that had been done and work done on the right of way. We went over what he called the Crown Mountain and came down into the valley where the camp was. I went into the tunnel that was being dug by their foreman, Mr. Bell, looked that over and after I got back home we then closed up the deal where we got the stock; and later on we exchanged the Empire stock for Crown, according to the option. I went over the mountain with Mr. Wayland. He showed me where we left the railroad, where the right of way commenced and told me they had acquired the right of way. I had that understanding of the matter. We had some little discussion

I think about how the money had been expended on this right of way and I think I asked him two or three times when we would come to a piece of work that was done on the right of way, I would ask if there wasn't more work than that done. Mr. Wayland said that to get their charter from the British Columbia government it was necessary to report the amount of work that had actually been done so as to comply with their law. In other words my understanding was that they had made a showing of having spent more money than was actually spent.

On CROSS EXAMINATION by Mr. Williams he testified as follows:

As I understood it this was for the purpose of misleading the British government. In other words my understanding was that the company's funds were such that they were trying to get as good a showing before the British Government as possible for the money they expended. I am an accountant myself and have been a banker. I am a director on the loan and finance and auditing committee of the Bank in Payette and I have been secretary of the Crown but do not believe I have ever been an officer of the Empire. I was secretary of the Crown a little over a year, and the records of the company would be the best evidence as to the time. I can't recall exactly now. While I was secretary I did not have control of the books; they were in the office of the International Development Company and were not under my control and direction. During that time I think Mr. Belden was one

of the directors. I do not think that when I went into office as secretary that Belden and Wayland practically relinquished any kind of control over the company. I went in with Mr. Butterfield under that kind of an arrangement but it did not bring about the result. I always had the books whenever I went to the office and asked for them. There was considerable discussion at one time about removing the books from Spokane but on account of Mr. Butterfield and myself not having control of the books we were not able to do what we wanted to. Mr. Butterfield and I desired them ing control of the books, we were not able to do what removed.

On REDIRECT EXAMINATION by Mr. Garrecht he testified as follows:

I gave land for my stock and the title, at the request of Mr. Wayland, went to B. G. Belden, as I remember, and I asked him why and he said that was Mr. Belden's father, and that they had an arrangement with the bank—he said that was Mr. Belden's father and I asked him how deeding the land to Mr. Belden's father would promote the properties and open them up, and I couldn't see where the company was getting any benefit out of it. He replied that Mr. Belden's father was in very close touch with the Bank of Montreal and had an arrangement whereby they could mortgage the land nearly to its full value and that the money went to develop the property.

On RECROSS EXAMINATION by Mr. Williams he testified as follows:

My recollection is that the deed was made direct to B. G. Belden and not to R. G. Belden. I am quite sure it was explained that the reason for doing this was because his father was in close touch with the Bank of Montreal. That conversation took place in my office in Payette and I have a distinct recollection of it. To this day I have never questioned the trade that I made with Belden and Wayland. While I was secretary of the company I did not do much of the work; I was simply a figure head. I worked possibly five days on the Kootenay books. I only investigated the railroad incorporation so far as the act of the British Columbia Government which granted the franchise is concerned.

(Witness excused.)

JAMES W. MUIR, called and sworn as a witness on behalf of the Government, on direct examination by Mr. Garrecht testified as follows:

My name is James W. Muir and I live at Salem, Oregon. I was an investor in the Crown, Empire and Michel. I had a talk with Mr. Belden concerning the second batch of stock in the Empire. I went to his office, was at his office in Milton; he came to me and told me that he would like for me to purchase a little of this stock, get enough stock for to take a railroad share. I told him I didn't feel able to buy any more stock; that I didn't have the cash and he

said it didn't matter, if I wanted to increase my holdings, that he would take my note. I think that was on Saturday, and I told him I didn't think I would buy any more stock unless I would confer with my wife first; and we set a date when he was to come down to my place on Monday, Monday at two o'clock, I believe, and so he came down and talked about a couple of hours and told me all about the mine and he had maps there showing the structures of the vein, Crown property. He told me that he thought it would be possibly as good as the Crown. After that I told him I would talk to my wife about it. So after they left I intended to go up the next day, but I went up that evening, the same evening, Monday evening and I came into the office and he says, "Well, I didn't hardly expect to see you so soon." I told him that I had something up my sleeve all the time was the reason I couldn't let him know about buying the stock then, and I told him my proposition, that Mr. Evans had told me, Mr. Evans offered to me stock, 1000 shares for one hundred dollars in three years time without interest. Mr. Belden's proposition was that I could have the stock for two years without interest. So I told him that I had seen Mr. Evans as I came into town and I told him I would take his stock. Mr. Evans was just going to supper; he told me that he would issue me the stock. I told Mr. Belden what I had done; I told him I concluded I would take the stock of Mr. Evans, so Mr. Belden picked up his chair he was sitting some distance from me, possibly twelve or fifteen feet, he picked up his chair and came

and sat down right in front of me and told me then, he says, "Mr. Evans' stock is bought and paid for and the money expended," he says, on the property. "Now," he says, "you buy that," he says, "and it wouldn't help the property a bit," he says. "If you take my stock the money will go to develop the property and it will be to your interest to take my stock." He talked for sometime, I can't relate all the conversation but the sum and substance was that I told him that I was with him; he convinced me that I was wrong in taking stock that had already been bought and paid for and the money expended, and I told him I would take it if it was all right with Mr. Evans. Mr. Evans came in about that time and I told him what I had done and he said it was all right, so I gave my note for three hundred dollars for the stock. I got some railroad shares with my stock. He told me at the time I was taking the last bunch to make up the 500—I had already bought 200, gave my note for it—that he held my note for, the first purchase—I told him that I would take the other 300 to make it 500 so I would get a railroad share; and when they issued the stock they sent me the railroad share with it but I do not think he told me at that time anything about what would be done with the money. It was said in my presence at one of their meetings that a railroad share possibly would be worth by the time this work would be done—that possibly the railroad share would be worth all of the money we would have to pay for the stock, that is, \$500.00. I don't recall anything being said by either Belden or Wayland about where

the money was to go that was paid for the railroad stock. I have not paid the company any money but gave them notes amounting to five hundred dollars, and fifteen acres of land of the value of \$225.00 an acre, but I do not know what value they put it in at.

On CROSS EXAMINATION by Mr. Williams he testified as follows:

Of this fifteen acres there was about twelve acres in cultivation, which I farmed afterwards for several years. I leased it from Mr. Belden.

(Witness excused.)

H. S. HOUSE, recalled on direct examination by Mr. Garrecht, testified as follows:

I have examined the books of the various companies for the purpose of ascertaining who owned the certificate from which the share of stock in the railroad, which was delivered to Mr. Muir, was issued from and find that that together with the other stock that he received was all transferred from certificates that belonged to the International Development Company, and none of the proceeds went into the treasury of the Crown, Empire, Mitchel or Crows Nest & Northern Railway Company. The books of the International Development Company show that the land was transferred to R. G. Belden on November 18, 1912, as part payment of his dividend.

(Witness excused without cross examination.)

MARGARET J. ALDEN, called and sworn as a

witness on behalf of the Government, on direct examination by Mr. Garrecht, testified as follows:

My name is Margaret J. Alden and I live at Payette, Idaho. I had stock in the Empire and the Crown. I have talked with both Mr. Belden and Mr. Wayland with reference to these properties. They said it was a very good investment, and they didn't know which mine was the best; they thought one was just as good as the other. They were referring to the Crown and the Empire. He said the stock in these companies was raising in value and had raised in value. When they were first on the market they were four cents a share and when we bought they were twenty-five cents a share—that is, the Empire was twenty-five cents a share and the other was seventy-five cents. He said something about his having stock in them himself.

MR. GARRECHT.—Q. Did he tell you how much he valued his stock at?

A.—Well, when Mr. Belden was at our house the last time when I bought shares he said he wouldn't take five dollars a share or his stock, and they expected to have the railroad completed by September 1st, 1911, that he thought it was a wonderful investment and would bring in a dividend by 1912, January 1st. They didn't tell me the exact amount, that night, but they said it would be more than we could possibly use. I told him at that time we were old folks and we needed everything we had, and that we were not able to go into it anyway, and he said that it wouldn't

be but a little time until we would get a dividend. We gave in exchange for the stock in the Empire Mine a lot which we valued at two thousand dollars and we gave cash for the other stock, sixty-five cents a share. I purchased at that time 1000 shares and I gave two lots in Caldwell. Besides this I gave Mr. Belden a note for \$150.00. He said it was an impossibility for the small stockholders to be frozen out; the stock was incorporated in British Columbia and he said the Canadians wouldn't stand off any such work as that.

On CROSS EXAMINATION by Mr. Williams she testified as follows:

I think this purchase was made about June 10th, 1911, the first one and the next was December, about the 12th of December—I am mistaken—the first purchase was made in July, about July 10th, 1910, and the following—the Crown purchase was made December 12th, 1910. Before I made the purchase I attended a meeting of some of the stockholders in my section. That meeting was held at Payette, Idaho; there were not many there, possibly fifty people. It was held in the Commercial Club building. I think Mr. Brainerd at one time was there. My attention was not called to Mr. Butterfield and I do not think he was there. There were quite a few of my neighbors there. I remember at the first part of the meeting hearing Mr. Elmer Bell talk. Mr. Bell and Mr. Brainerd, who were not my immediate neighbors, said they had been up to see the property. Neither my husband nor myself investigated the property at all. The first pur-

chase was the time I gave this two thousand dollar lot that I referred to. The lot was improved and not mortgaged. The other two lots I spoke of were Caldwell property, and I do not think they were improved.

On REDIRECT EXAMINATION by Mr. Garrecht, she testified as follows:

I do not know if Mr. Belden said anything about what was to be done with the property that was received for the shares but he said the purpose of their selling stock was to develop the mines. He said that there was a company that was after the mine and if the stockholders would all turn in and buy more stock, why they would get more money for to develop the mine, and they would not have to let anyone else in.

On RECROSS EXAMINATION by Mr. Williams she testified:

He said that at the meeting o December 10th, 1910, I understood at that meeting that there was money at that time in the treasury, \$130,000.00, for the building of that railroad there. I cannot tell you whether at that meeting there was any discussion in regard to a bond issue. There was so much said at that meeting I cannot tell you what was said and cannot tell you whether at that time the language of that cablegram sent by Mr. Butterfield from Paris was read or not.

MR. WILLIAMS.—Q. Wasn't it recited in that telegram that the amount of money to be raised by these bonds was something in the neighborhood of a million dollars—I can't give you the exact amount—

and that the company would have to pay a certain percentage in order to get the money and a certain commission in order to get the money, and didn't the stockholders there at that time vote on the question of whether they would bond the property or wouldn't bond it?

A.—Yes, they did; because they all went in, they all went in equally and spoke for stock.

Q.—That is, they decided that instead of paying upon this bond issue which had been offered to them, they would buy more stock and try to build the railroad themselves, is that it?

A.—Well, at that time I tell you they said that the money was already in the treasury for the railroad.

Q.—Then why were they going on an investigation for money then, if it was already in the treasury?

A.—Well, it was to develop the mine. I don't know in what way. I cannot remember of the cablegram having been read at that time.

(Witness excused.)

H. S. HOUSE, recalled on direct examination by Mr. Garrecht, testified as follows:

I have examined the books of the Crown and Empire Companies to ascertain from what source the stock purchased by Mr. Alden came and find that the Crown and Empire stock was all transferred from certificates that were owned by the International Development Company and none of the proceeds went

into the treasuries of either the Empire or the Crown.

(Witness excused.)

C. A. BURCH, called and sworn as a witness on behalf of the Government, on direct examination by Mr. Garrecht, testified as follows:

My name is C. A. Burch and I live at Waitsburg, Washington. I purchased some shares in the Crown, the Empire and Michel, and have had a talk with Mr. Belden relative to these properties. I gave my note for 500 shares in the Crown and he told me they would be shipping coal by October 1st, 1911, and that a two percent dividend would be paid on January 1st, 1912. I gave an additional note and was to have work when I went up to inspect the property. I wrote about the work and never got any answer. The note was to bear eight percent interest and he said the note would take care of itself, I would never have to pay it, is what he told me; said it would pay dividends and I was to work it out at the mines; part of it was to be paid to me and part of it applied on the note.

On CROSS EXAMINATION by Mr. Williams he testified:

I bought my stock in the Crown in January, 1911, and I traded my property in Waitsburg for the Empire and Michel in December, 1910. I bought 500 shares of Crown and gave my note for it, which I never paid. I believe they told me the mines were eleven miles from the railroad. They said ther was a railroad to the Crows Nest but none further on I did

not know that before they could be shipping the railroad would have to be built. This note and money were to go to build a railroad. Mr. Belden said that the note which I gave and the property were to be put up as collateral at the Bank of Montreal to secure money to build the railroad and secure mining equipment. The note that I referred to is a note for five hundred shares of Crown stock.

(Witness excused.)

CHARLES COOPER, called and sworn as a witness in behalf of the Government, on direct examination by Mr. Garrecht, testified as follows:

My name is Charles Cooper and I live at Walla Walla. At one time I owned stock in the Michel, Crown & Empire Coal & Coke Company. I was at a meeting held by Belden and Wayland in Walla Walla in which they call the Ransom building. They represented these properties to be first class coal mines. They were telling about where they owned railroad right of way and a certain amount of money in the treasury; they had some man in Paris trying to negotiate a loan. After that I bought stock in the Crown Coal & Coke Company, the Michel and Empire. I put in a section of land I wanted it all in Crown and they were not willing to give me all of it in the Crown so I took one-third of the value in each.

MR. GARRECHT.—Q. Was there anything said about the land that was traded, about what was to be done with it?

MR. WILLIAMS.—I object to that as incompetent, irrelevant and immaterial and not within the issues in the case.

THE COURT.—Objection overruled.

(Defendants except and exception allowed.)

A.—Well, now, the deal was made through a real estate man and I just went there to sign the deed in the office. The deed was made out and I signed it, and Mr. Belden went around to my residence to have Mrs. Cooper sign the deed; and on our way there I asked him how he could develop the property with such truck as this, and he said, "We can borrow money on this."

Q.—Did he say anything about the Empire or Michel properties?

A.—Well, he didn't talk anything about the monly what I heard at this meeting that I spoke of previous.

Q.—Well, at the time that they wanted you to take one-third in each property did they say anything about their relative values?

A.—No, he said they couldn't give it all in the Crown; he wanted to take some Michel and some Empire stock with it, so I took equal value of each stock.

On CROSS EXAMINATION by Mr. Williams he testified as follows:

The agent that I referred to was Mr. L. G. Baird,

of Walla Walla, who was a general real estate agent.

Q.—How did it happen that you asked about what they were going to do with the land or could do with the land?

A.—Well, I just threw that out to find out whether it was his private stock or treasury stock; and the remark that he made led me to believe that it was treasury stock.

Q.—Did Mr. Baird represent you throughout this deal?

A.—Well, I had the property there in his name to sell and he spoke about his chance to make a trade.

Q.—Did he tell you what he had done in making the negotiations?

A.—Yes.

DEFENDANTS' EXHIBIT "188" marked for identification and DEFENDANTS' EXHIBIT "189" admitted without objection.

(Witness excused.)

ROBERT McBEATH YOUNG, called and sworn as a witness on behalf of the Government, on direct examination by Mr. Garrecht, testified as follows:

My name is Robert McBeath Young, and I live at Fernie, British Columbia. I am connected with the Crows Nest Pass Coal Company engaged in coal mining. I do not know where the Michel Coal Mines Limited is. I recognize the map which you show me.

Q.—What properties, as shown by the map there, belong to the company that you represent? Have you a letter from Mr. Wayland relative to a right of way across that property?

(The witness produces a letter.)

MR. GARRECHT.—I offer this in evidence.

MR. WILLIAMS.—No objection.

A letter admitted and marked PLAINTIFF'S EXHIBIT "190".

Another exhibit admitted and marked PLAINTIFF'S EXHIBIT "191".

MR. GARRECHT.—Q. Now, Mr. Young, do you know whether at any time subsequent to the date of these letters, if the right of way was secured across that land?

A.—No arrangements have been made since that date.

Q.—What is your office with the company?

A.—Secretary and land commissioner.

Q.—Would that go through your office if there were such arrangements?

A.—Yes, sir.

Witness excused without cross examination.

A. B. TRITES, called and sworn as a witness on behalf of the Government, on direct examination by Mr. Garrecht, testified as follows:

My name is A. B. Trites, and I live at Fernie, British Columbia, and am engaged in the mercantile business. I know where the Crown Coal & Coke Company property is in the Crows Nest district. I am the owner of property close to it, the property known as the McInnis coal property.

Q.—And it is also known as the Trites-Woods coal properties?

A.—Yes, Trites-Woods are the owners.

Q.—I will ask you, Mr. Trites, if a survey was ever made across that land?

A.—A survey has been made, stakes have been surveyed across the property.

Q.—Was a right of way ever secured?

A.—It was never secured; no arrangement was ever made for the purchase of it.

(Witness excused.)

SAMUEL L. DUNLOP, called and sworn as a witness on behalf of the Government, testified as follows:

My name is Samuel L. Dunlop, and I live at Free-water, and my business is fruit farmer. I was a purchaser of stock in the Empire, Crown and Michel coal mines properties and have talked with Mr. Belden and Wayland with reference to these properties. I talked I believe with Mr. Belden and saw Mr. Wayland too. I purchased stock in the Empire

and Crown and paid twenty-five cents per share for the Empire, \$1500.00 altogether in cash. Mr. Belden said in relation to this property that the Michel Creek was the line between the Empire and the Crown, and pointed it out on a map which he laid down on the floor at my house. He said they were coal properties and he thought that the Empire was the best at that time because it would be easier worked, because when the tunnel was in there the water would run out of it and the other one we would have to pump it out. I bought some Crown stock at a meeting that was held in Walla Walla and they had maps up on the wall showing what they were going to do and when they was going to have it in operation and all of this, and they wanted me to take some and I took 1000 shares, for which I paid seventy-five cents a share, in notes, for \$750.00, of which I paid one-half. When he was selling the Empire stock he said if we will take \$500.00 worth of the Empire you get a share of railroad, which is worth a hundred dollars, which was to be put into the railroad, to build the railroad. When I bought the Empire, he said he was working the Empire, he didn't say anything about the Crown, much but at another time he said if I wanted some Crown he would let me have some of his own stock if I wanted it.

On CROSS EXAMINATION by Mr. Williams he testified:

The meeting which I have testified about was held in the Ransom building in Walla Walla. There was

a good crowd there and the general condition of this property was explained. I do not remember who talked other than Mr. Belden and Mr. Wayland. I do not remember whether any other people made talks to the crowd. I never went up to see the property myself and never talked with Mr. Bowlus about the situation there. Mr. Hopson talked to me. I guess I talked with Mr. Vinson about what he found up there and also talked with Mr. Bryan but did not talk with Mr. Evans. He told me that he thought the Empire was the best because if the coal was there the water would drain out and could be worked more economically. I don't know as he said that the coal was covered nor do I know whether he said there were any outcroppings. I knew at that time that they were driving a tunnel.

On REDIRECT EXAMINATION by Mr. Garrecht, he testified:

He said that the money which I paid for the stock was to go to put the tunnel in and develop the property.

On RECROSS EXAMINATION by Mr. Williams he testified:

I bought six thousand shares of Empire at twenty-five cents a share. I don't remember whether it was right at that time that Belden told me I could have some Crown if I wanted it, or not, but I know I was talking with him and I was asking him about the Crown and he said there was none on the market.

He said, "If you want it, why I will let you have some of mine." I don't know as he told me that the Crown had ceased the selling of treasury stock at that time, and I do not remember whether he explained to me why it was there was none on the market. It was when I bought the stock that I heard him say what was to be done with the proceeds. My wife and Mr. Bryan were present. I can't say just what words he said only he described the land and that he had a map and laid it down on the carpet. He said the money would be used to drive the tunnel and develop the mine. I don't know how he came to say that; said they was waiting to sell the stock to get the money to develop the mine. I don't remember him saying that down at the meeting there.

(Witness excused.)

J. A. HAYTON, called and sworn as a witness on behalf of the Government, on direct examination by Mr. Garrecht, testified as follows:

My name is J. A. Hayton, and I live at Palouse, Washington. I purchased some Empire stock from Belden and Wayland who were together at the time, in April, 1910, at my home in Walla Walla. They came there to sell me stock in a coal property, they said, that they owned in British Columbia, and they represented that it was a property that they had paid forty thousand dollars for and they also stated that the property had valuable timber on it; that the timber itself was worth the price that they paid for it;

and they showed me samples of coal and they said the coal didn't come off of the Empire but came off of an adjoining property. They did not claim that any coal had been found on the Empire. Mr. Belden was doing most of the talking and I asked him: "How do you know there is coal?" They represented that there was coal there of course and they claimed that the veins of coal that were on the adjoining property, the Crown, extended on to the Empire, but there had been none of them opened, they had never found any coal, and I asked him then if there was no openings on the Empire into the coal, no coal discovered. He said no, that there was coal on the Empire, and says, "Mr. Hayton, we know; we know what we are talking about; we have all of these lands experted and we know; we know there is coal there." I purchased 2000 shares at twenty-five cents a share and gave a note for it, which I afterwards paid. They said they were selling this stock because they were going to develop and operate the mine, build a railroad, but I didn't pay much attention about the railroad. The railroad stock was all sold at that time they said and there was no more—I think they were giving away railroad stock with these shares, but they claimed that was all gone so I didn't get any railroad stock; don't know anything about that. They were talking about shipping coal and said it would not be very long, within six months or a year, they would be shipping coal.

On CROSS EXAMINATION by Mr. Williams he testified as follows:

Q.—When you went up and examined the properties you were better pleased with the Crown than you were the Empire, isn't that the fact?

A.—Well, it came about in this way: Mr. Belden represented that they owned the Empire mine when he sold me the stock and when I went up there I went out looking over the property with a little Frenchman they called Baptiste and I went over Crown Mountain and looked at the Crown property with him. I think Belden and Wayland were there at the time and some others. When I went up there I found out that they didn't own the Empire property and I put it up to Mr. Belden that they didn't own the Empire mine or didn't pay forty thousand dollars for it, and then he said, "Mr. Hayton, if you are not satisfied with the Empire stock, why, just surrender some of that and take some of the Crown," and I said that was all right, and took some of the Crown. He says, "We will give you a special deal on this Crown right now; we have got some eastern stock," he says, "we can sell cheap; we have been selling it at forty," but he says, "If you surrender part of the Empire and take a thousand shares of Crown we will let you have it at thirty-seven and a half cents."

On REDIRECT EXAMINATION he testified as follows:

This conversation took place after I got back to

Spokane and this was the time that I told him he had not paid forty thousand dollars for the property.

(Witness excused.)

E. J. KIRK, called and sworn as a witness on behalf of the Government, on direct examination by Mr. Garrecht, testified as follows:

My name is E. J. Kirk, and I live in Oregon. I purchased some Empire stock from R. G. Belden. Before I bought it I had a conversation with him on or about the last of May, 1909. Mr. Belden came to my place with a Mr. Faires and they introduced themselves and asked to show some proposition, mining stock they had, and they asked if they could show their samples and we talked there in the house, in the sitting room; my wife was present, and they showed lots of samples and pointed the properties out on the map. They said that this Empire property was a continuation of the Crown, that they joined one another, and the same veins that was exposed there and showing on the map on the Crown continued on into the Empire and that the only reason that they were not visible that whenever the earth cooled off at the time of the eruption it contracted and the Empire fell down and the Crown raised up; that is why it exposed the Crown, and the Empire was not visible on that account. I bought \$5,000.00 worth at four cents per share. He went on and told me that this was an option, that if I would buy this stock now that we would get in on the ground floor at four cents and

whenever we sold stock enough, to the amount of forty thousand dollars, we would buy this option and then they would incorporate and have a mine. They told me that every five hundred dollars of stock that was sold in the Empire, one hundred dollars went into the railroad company, Crows Nest & Northern, I believe the name was, and they gave me a one hundred dollar share and said that the one hundred dollars was to develop the railroad, for to build the railroad. They said they had the right of way all secured, work done on it, part of it; there was some grubbing and such work; it was all surveyed and they had the right of way secured. I also bought some of the stock in the Michel property and they stated that it was just as good as the other. I believe I bought a thousand shares of it at twenty cents a share, which I paid for in real estate; traded them a ranch for stock in the Michel and some in the Mills and some in the Crown. The Crown I believe I paid it was either forty or thirty seven and a half cents a share. The ranch was one I had in Walla Walla County and they just traded, they gave me 5000 shares in the Mill and 5000 shares in the Michel. The Michel was selling at twenty cents and the Empire at that time was four cents. They came back afterwards and said that they had bought the option of the Empire and now, if we would go in and buy some stock for development purposes, that there was no use in buying the option unless we bought stock for to develop it, the mine would be no good to us, and I took 500 more at fifteen cents a share; made in all one thousand dollars I put in the

Empire. I gave him two notes of one thousand dollars each and at the time I turned them over they were endorsed by R. G. Belden, "without recourse" and I asked him why they were endorsed without recourse and he said he had entered into a contract with the directors of the company for to do their business and that they gave him that power and authority and just as soon as he got these notes that he endorsed them and turned them back into the treasury; and I told him I didn't like to take a note endorsed without recourse; and he said, "I have got the Crown Coal & Coke Company at my back, which is worth several million" and I had no chance to talk. At the meeting in the Ransom Building I talked with Mr. Belden about the Crown property and I took quite a bit of stock; I took something over nine thousand at that time, and I asked him quite a few questions. I asked him how much promoters stock he had reserved for his own purposes and he said he didn't reserve any. he was on an equal footing with any other stockholder; any stock he got he had to pay for it; and any stock he got in the future he would have to pay for it the same as any other stockholder.

ON CROSS EXAMINATION by Mr. Williams he testified:

I believe they told me I was an officer in some of these companies. I don't know whether I was or not. I never qualified. I do not know that I was ever an officer in either the Crown or the Mitchel. I cannot state when it was that I was an officer in the Empire

as I paid so little attention to it. It might have been in 1910. I didn't have any business to do and never was asked to do anything except one time I believe they said that they had increased the stock from twenty-five cents to thirty cents and said that the rest of the directors had made it. They sent me a letter perhaps stating they was going to increase the stock, and I never received it; that is all the business I ever did or ever was asked to do. I never qualified by taking the oath of office and was never asked to do so. I believe that is my signature to the letter which you hand me but I didn't write no letters. I signed a letter up at the office in the Peyton Building I believe one time, something about when I was over the property. Mr. Belden read it over and asked me if I would sign it, they said I wouldn't take any chances, that it was something to help boost the property; that it was a note of his and would enhance the value of the stock. I think he read it over to me before I signed it.

The letter admitted in evidence and marked DEFENDANTS' EXHIBIT "192".

I was up there a few days but was only over the property once. One day I went up over the Crown Mountain, saw the prospects on the Crown; I went into a hole there on the Empire property. I don't know what a tunnel is as I was never in a mine in my life, it was a kind of a tunnel, what they called a tunnel, and I went into it. They told me that was where they were expecting to strike the coal. I knew that the coal did not show on the surface. Belden and

Wayland told me that they were satisfied that the coal continued into the Empire ground and that is the reason I first bought the stock but I do not remember about what they said about the Empire being the more regular formation. The real estate which I gave them was in Umatilla County, Oregon, and I had lived on it several years and it was occupied at that time. The notes that I received, one of them was the Walter J. Wood note in Walla Walla. I do not remember any other report which I made, one which Mr. Hopson and some others signed. I think maybe I did but I wouldn't be certain.

On REDIRECT EXAMINATION by Mr. Garrecht he testified:

I took no part in the dictation of this letter and I did not know anything about how far the veins were apart but they showed me a lot of prospect holes opened up.

(Witness excused.)

A. L. DEMARIUS, called and sworn as a witness on behalf of the Government, on direct examination by Mr. Garrecht, testified as follows:

My name is A. L. Demarius and I live five miles east of Milton. I purchased some Empire coal stock, and I bought the first from Mr. Belden. I got it close together and the last I got from Mr. Bryan, in 1909, I think, the whole business. The first I say I got from Mr. Belden, well, he was down there and I

don't know whether he closed the deal or not but he talked to me before I purchased it; said he thought it was all right; recommended it to be all right. I took 1000 at that time and then later I took 6000, paying cash for what I got. In regard to the first one thousand dollars that I paid for the Empire stock, they told me that they wanted it to improve the mine; that they had started a tunnel and put in the railroad. At the same time I got two shares of railroad stock. They valued these shares at a hundred dollars apiece, I think they claimed but they did not say what was to become of the one hundred dollars. I got it right in with the other, and they considered this really as worth one hundred dollars, was my understanding; talked that way, I would get a couple of shares with each piece.

On CROSS EXAMINATION by Mr. Williams he testified:

I think the time when I talked with Belden and Wayland was along in the fall of the year, about October sometime, 1909, I think it was in Walla Walla, when I met him the first time and the second time I think was at Milton. Some of them had been at my place but I don't just recollect who it was, three or four of them together all the time; they was around there. I don't just recollect the date when they were at my place but it was along there in the fall. I am quite sure that I talked with Belden and Wayland. I don't know whether they were both there at Walla Walla the first time or not; I couldn't say as to that.

At the time I gave the check for the stock I think I was at Freewater. Belden said he thought the property was all right, in their opinion it was all right, but I did not go into details in particular. They said they had started the tunnel and was at work on it at that time. They also spoke about a railroad and thought they would be paying dividends in about eighteen months. They would have to have the railroad in before they would take out the coal. The last deal I met Mr. Bryan himself, who recommended it. I attended no meetings at all.

(Witness excused.)

MRS. JENNIE HARRINGTON, called and sworn as a witness for the Government, on direct examination by Mr. Garrecht, testified as follows:

My name is Mrs. Jennie Harrington, and I live at Payette, Idaho. I invested in Empire Coal stock to my sorrow, having bought it of Mr. Belden. He said it was valuable; he told me that there was acres and acres of this coal land and it was simply a mass of coal, and he said there was just a beautiful stream of water between it and the Crown, and said it was just as valuable as the Crown property and he would advise me to buy in the Empire. And I said, "Mr. Belden, I am a poor widow woman and all I have I have to work for it." And he says it will be the best investment, Mrs. Harrington, that you ever made, he says, "You will be getting a dividend by 1912, and you will be getting twenty-five dollars a month as long as

you live and it will go to your children when you are dead." He said as I was a poor widow woman he would let me have it for twenty-five cents and the money was to develop the mines; he said the railroad would be built in there by the first of September, 1911, and by 1912 we would be getting our dividends. He said it was not assessable; we would never have to pay any assessments on it at all. I bought 800 shares in all and paid \$200.00 in notes, which I afterwards paid at the bank.

On CROSS EXAMINATION by Mr. Williams she testified:

Belden said the stock was worth one dollar a share, had been selling at one dollar a share, the Empire stock, and said it was just as valuable as the other stock. He did not try to get me to buy Crown stock, because he said this was cheaper for me and it was just as valuable as the other. I don't remember that he told me anything about the coal veins that were on the Crown. He said there were hundreds of acres of this coal land and it was simply a mass of coal. He didn't exactly say what work they were doing on the Empire; said they were building a road and they would soon have it finished. He was talking about the Empire and he told me what kind of property it was. He did not tell me that the Crown property had the veins opened up and that they believed the coal extended over into the Empire. He didn't tell me anything much about the Crown; told me it was

as valuable a mine as the Empire, was worth just as much as the other.

(Witness excused.)

MRS. JENNIE INMAN, called and sworn as a witness on behalf of the Government, on direct examination by Mr. Garrecht, testified as follows:

My name is Mrs. Jennie Inman and I live at Payette. In September, 1909, I bought stock in the Empire Coal Company. Before I bought my stock I had a talk with Mr. Belden and he said it was the best investment that we ever could make and it would be of great benefit to us and that we would never need to work any more. He knew my husband was not able to work and I was not able to do much of anything neither, and he said we never could lose anything by it. I told him I was afraid to go into it; we had to work very hard for what little we had; and he said it was an impossibility; we couldn't lose especially because it was in Canada and I told him I had heard of such things before, the big fish would always eat up the little ones; and he said in this case it was altogether different; it couldn't be done. I bought 6000 shares and paid twenty-five cents a share, giving property in exchange for it. The property was situated in Middetown, Idaho. He stated that the stock was being sold to develop the mines and I would get the first dividend by January 1st, 1912. They spoke about the Crown mine but he advised me to buy in the Empire; he said eventually it would be the best mine

of the two; he would prefer that mine, and didn't urge us any way at all to buy in the Crown. I knew very little about it. I didn't know anything about any mine at all and the Crown and the Empire was all he talked about and he didn't encourage us at all in buying the Crown; he wanted us to buy the Empire as it would be the best mine.

On CROSS EXAMINATION by Mr. Williams she testified as follows:

At the time I had the conversation with Mr. Belden there was present Mr. Inman, myself and Mr. O'Rell. I made my purchase in September 1909, and Mr. Belden told us about the coal formations how good they were. He said he thought it was as good as the Empire. He said that they were driving a tunnel on the Empire at that time. I signed the document which you show me but I don't remember whether I read it at the time or not I can't say.

Document admitted in evidence without objection marked DEFENDANTS' EXHIBIT "193" and read to the jury.

THE WITNESS.—He never said that to us at all; it was treasury stock. I was not at the meeting that was held there at that time and did not hear anyone talking about the stock.

On REDIRECT EXAMINATION by Mr. Garrecht she testified as follows:

The body of that receipt is not in my handwriting, and I don't remember whether I read that at all.

(Witness excused.)

WHEREUPON an adjournment was taken until 10 o'clock A. M. March 29th, 1914, and thereafter court duly convened; present as before.

H. S. HOUSE, recalled on behalf of the Government, on direct examination by Mr. Garrecht, testified as follows:

I have examined the books of the Empire, Crown and Michel, for the purpose of ascertaining who owned the certificates from which the stock sold to Mr. Cooper was transferred. All of the Crown stock was transferred from certificates that were owned by the International Development Company. All of the Michel stock was issued from certificates that belonged to the International Development Company, and of the Empire stock there was 4576 shares of that that was transferred from certificates that had originally come from the treasury to the International Development Company at twenty-five cents a share, for which she paid thirty-five cents, and forty-five hundred and seventy-seven shares of Empire stock was transferred from the certificates that had originally come from the treasury at twenty cents a share. The total property for stock in the Crown and the Michel which was issued from the International Development Company's certificates was real estate valued at \$6400.00. The proceeds did not go to the treasury of these companies. I have examined the books of the companies for the purpose of ascertaining from what certificate the stock

purchased by Mr. Dunlop came and find that he purchased 6000 shares of Empire stock at twenty-five cents a share for which he paid cash, \$1500.00. All of this Empire stock was transferred from a certificate that belonged to the International Development Company. None of the proceeds went to the treasury of the Empier Company. He got three shares of Crows Nest & Northern Railway stock and these three shares were purchased by the Empire Coal & Coke Company from the International Development Company. None of the proceeds went to the treasury of the railroad company. He also purchased one thousand shares of Crown stock at seventy-five cents a share and this came from certificates that were held by the International Development Company in trust for the railroad company. There was fifty cents a share of this one thousand shares, or five hundred dollars that went to the railway company. That was turned over to the railroad company. The stock purchased by Mr. J. A. Hayton, the Empire stock, was transferred from a certificate that was owned by the International Development Company. This was the stock for which he paid \$300.00. Then afterwards he purchased 2000 shares of Crown stock for which he paid \$750.00 in cash. He first gave his notes and then paid his notes. This 2000 shares of stock was transferred from certificates that belonged to the International Development Company. None of the proceeds went to the Empire or the Crown. I can also show from what certificates the stock pur-

chased by Mr. Kirk was transferred. He purchased 15,835 shares of Empire stock, all of which was transferred from certificates that were owned by the International Development Company. He purchased 23,167 shares of Crown stock and all of this stock was transferred from certificates that were owned by the International Development Company. He purchased 5000 shares of Michel stock and that was transferred from certificates that were owned by the International Development Company. He paid in all \$2706.45 in cash and real estate valued at \$12,500.00. On this real estate deal there was included 5000 shares of Mills. I cannot tell at what price it was taken. That was turned in, that real estate as cash. None of the proceeds went to the treasuries of the Crown, Empire or Michel. He got two shares of railway stock which was part of the stock that was purchased by the Empire Coal & Coke Company from the International Development Company. None of the proceeds went into the treasury of the railroad company. Mr. A. L. Demarius purchased 8000 shares of Empire stock for which he paid \$2000.00 cash—first gave his notes and then paid his notes later. All of this stock was transferred from certificates that were owned by the International Development Company but none of the money went into the treasury of the Empire Company. He got four shares of railroad stock but none of the proceeds went into the treasury of the railroad company. This was part of the railroad stock that was purchased by the Empire from the International

Development Company. Mrs. Harrington purchased 800 shares of Empire stock for which she paid cash \$200.00. She first gave her notes and then paid her notes. All of this stock was transferred from certificates that belonged to the International Development Company and none of the money went into the treasury of the Empire Company.

On CROSS EXAMINATION by Mr. Williams he testified as follows:

The Dunlop sale was not a note transaction. There was \$1500.00 in cash. The Cooper transaction was a real estate deal; she traded in a section of land valued at \$9600.00 for all of this stock. The Hayton was all cash. In regard to this list which I have here, this shows the names of whom the railroad stock was issued and the number of shares, and this shows where the railroad stock was got, that is, where they received 3,333 shares at fifteen cents a share and these figures out here are figures that are listed in the minute books of the Empire and where they received railroad stock with the stock that was purchased in the Empire. This is a list of every one that got railroad stock.

The list identified by the witness marked DEFENDANTS' EXHIBIT "194" for identification.

(Witness excused.)

MR. GARRECHT.—That is the Government's case. In the matter of the third count in the indictment, we don't think it has been sufficiently contested and we withdraw the third count.

(Whereupon the jury retired.)

MR. MILLER.—The defendants at this time move the court to direct the jury to return a verdict of not guilty upon the first and second counts in the indictment and to withdraw them from the consideration of the jury for the reason that the first count of the indictment does not state facts sufficient to constitute an offense under Section 5840.

THE COURT.—That question cannot be presented in a case of this kind in this court. You can only object to the indictment by demurrer or motion to arrest the judgment.

MR. MILLER.—And the same as to the second count.

Further that there is not any evidence showing that the defendants or either of them made any false representations as to the matters charged in the information, and there is not any evidence that the defendants or either of them, did other than express their opinion that the veins of coal on the Crown extended under the Empire.

Further there is not any evidence of a conspiracy between the defendants to defraud the parties named in the indictments or any other person. Neither is there any evidence of a conspiracy of any kind having been entered into, or no evidence of any acts having been committed under any conspiracy.

Further the testimony shows that whatever state-

ments were made by them relative to the existence of coal on the Empire, claim was based upon statements made by the Engineers or in the defendants' opinion the Crown veins extended under the Empire.

Further if such statements were made by defendants or either of them, it was merely a matter of opinion for which they could not be held criminally liable.

Further all of the evidence shows the defendants were acting in good faith and even if their judgment was wrong and investors lost money they would not be guilty of any crime; in other words, the defendants could not be convicted for error of judgment.

Further, that there is not any evidence that the defendants or either of them devised any scheme or artifice to defraud the parties named in the indictment or any other persons, neither is there any evidence that in carrying out any scheme or artifice to defraud the defendants or either of them, deposited or caused to be deposited the letter or letters set out in the post office establishment of the United States for the purpose of defrauding any person or persons, neither is there any evidence that they deposited these letters in the post office for the purpose of assisting in carrying any scheme into effect.

That the evidence is insufficient to establish the crime attempted to be charged in the indictment or either count thereof as to either of the defendants.

THE COURT.—On the entire case I am satisfied it will have to go to the jury. The motion will be

denied. Whether the testimony is true or false is solely for the jury.

(Defendants except and exception allowed.)

MR. WILLIAMS.—We move the court to withdraw from the consideration of the jury all evidence relative to defendants having sold personal stock representing it was treasury, and all evidence relative to sale of railroad stock for the reason it is not within any of the issues in the indictment or letters contained in the first and second counts thereof.

(Motion denied. Defendants allowed an exception.)

(The jury returned into court and Mr. Williams made an opening statement on behalf of the defendants.)

WHEREUPON the following exhibits were admitted in evidence without objection:

Defendants' Exhibits "195" and "196" (pages 18 and 19 of the Michel minute book).

Defendants' Exhibit "197" (page 27 of the Michel minute book).

Defendants' Exhibit "198" (page 28 of the Michel minute book).

Defendants' Exhibit "199" (page 50 of the Michel minute book).

Defendants' Exhibit "200" (page 53 of the Michel minute book).

Defendants' Exhibit "201" (page 9 of the Empire minute book).

Defendants' Exhibit "202" (page 14 of the Empire minute book).

Defendants' Exhibit "203" (page 17 of the Empire minute book).

Defendants' Exhibit "204" (page 19 of the Empire minute book).

Defendants' Exhibit "205" (page 24 of the Empire minute book).

Defendants' Exhibit "206" (page 32 of the Empire minute book).

Defendants' Exhibit "207" (page 34 of the Empire minute book).

Defendants' Exhibit "208" (page 38 of the Empire minute book).

Defendants' Exhibit "209" (pages 40, 41 and 42 of the Empire minute book).

WHEREUPON an adjournment was taken until 2 o'clock P. M. April 29, 1914, and court thereafter duly convened; present as before.

Whereupon the following exhibits were admitted:

Defendants' Exhibit "210" (page 9 of the minute book of the Crown Company).

Defendants' Exhibit "211" (page 26 of the Crown minute book).

Defendants' Exhibit "212" (page 31 of the Crown minute book).

Defendants' Exhibit "214" (pages 42 and 43 of the Crown minute book).

Defendants' Exhibit "215" (page 25 of the Empire minute book).

Defendants' Exhibit "216" (page 46 of the Empire minute book).

Defendants' Exhibit "217" (page 52 of the Empire minute book).

Defendants' Exhibit "218" (page 54 of the Empire minute book).

A list of the officers and directors of the various companies admitted and marked DEFENDANTS' EXHIBIT "219".

RUSSELL G. BELDEN, one of the defendants, after being first duly sworn, testified as follows:

DIRECT EXAMINATION by Mr. Williams:

My name is Russell G. Belden, am thirty-five years old and have resided in Spokane for thirty years.

Q.—And after that what did you do?

A.—I spent a year, nearly a year in Spokane in—no, I went out and worked for Mr. Clagstone of Idaho for several months and then I came and worked on a salary for a few months and then I started in the real estate business with Mr. Wayland. Started in

the real estate business when 25. I would say that we ran our business for something like a year before we incorporated the R. G. Belden Company. Before incorporation it was co-partnership, Mr. Wayland and myself. Did very little other than real estate, some brokerage. We had adjoining offices with Mr. Hampell and Mr. Weeks for that period that we were in the real estate business, and it was during that period that I met him. It was about a year before we organized the International Development Company. The records of the R. G. Belden Company show what the assets were. Mr. Hampell never was associated in the R. G. Belden Company. We organized the International Development Company prior to becoming interested in British Columbia and our first work was an irrigation project; the coal propositions arose after the Development Company was organized. It was before the organization of the Development Company that the option was acquired on the McGuire group. These McGuire claims were down on the Flathead, in British Columbia. The Flathead is about twenty-seven to thirty miles from the Empire and Crown claims. The McGuire claims were the first ones we investigated. Professor Shedd went in with me from Belton, Montana. We went up about 75 miles, and I covered that field very thoroughly, and then made an investigation of the Crows Nest and examined it and abandoned the McGuire group. Hampell joined me on that trip, as I came out, and we worked as long as our provisions lasted—previous

to that, however, had not gone into this—up Michel creek. I went over the Corbin property and I could have had that ground, but did not like it. Lamareaux then said, "Belden, I have been with you long enough now so that I know what you want and I will take you up and show you a property here," and then he took me into the Michel ground and the McInnis ground. The McInnis ground at that time was already staked and developed. I had visited practically all of the large mines in the district. I believe I spent practically eleven months on this work, and had not accepted anything that had been offered.

When Lamareaux took me up to the Michel Creek I went over the McInnis property first and examined that very carefully. It had been opened up quite extensively, just as extensively as it is today. There has been no work done on it since. We traced the veins along the mountain on the McInnis ground, and we crossed the creek to what became the Michel property and traced the strata of rock, sandstone, slates and so forth. Lamareaux was with me. It was at that time that I staked the Michel claims, and had an engineer's report on the Michel. Mr. Gamble was the engineer. I believe we discussed the Michel also with Mr. Green. I don't remember the date that Mr. Gamble came into the employ of the company. Prior to that I had talked to Mr. Thorn who had done the work on the McInnis property and I had also discussed the property with Mr. McViddie, the Provincial surveyor. He was not a coal expert exactly,

but the man who has done practically all the government survey of coal properties in there.

Q.—Now, who was this one engineer you said you went in with?

A.—Mr. Thorn at one time with the Crow's Nest Pass people, at one time with the Canadian Pacific; with the Canadian Pacific at the time the McInnis property was entered upon.

Q.—Was he a coal expert?

A.—Yes. He put in the big property at Hosmer for them.

Q.—Did he give you an opinion as to what the situation was on the east side of Michel Creek?

A.—Yes.

Q.—Did he say anything about whether the formation continued on that side, in his opinion?

A.—He told me at that time that they had always intended to have that property, along with the McInnis property, if the Canadian Pacific took it.

Q.—What did he say as to the formation continuing?

A.—He said it was very regular, wasn't any question but what the coal unlaid the property.

Q.—How soon after the organization of the Michel property was it that Mr. Gamble came with the Michel?

A.—I should judge it was about a year afterwards, after the organization of the company. Mr. Gamble said there wasn't a question but what there was coal on it, and the permanent work was under the direction of Mr. Gamble.

A.—The first year Mr. Hemphill took charge of the camp there with prospectors, and Mr. Penn, and that was a period of prospecting, purely for locations of veins on the surface; and while they found small showings of coal they didn't find anything in the way of a vein; and when our permanent work was started Mr. Gamble took charge of that.

Q.—Did you know what companies Mr. Gamble had been connected with as coal man?

A.—Mr. Gamble was selected by the Pittsburg stockholders in the Crown Coal & Coke Company, with the recommendation of Mr. Taylor, who is considered one of the most prominent coal experts of the United States, and who was in charge then and still is of the Pittsburg Coal Company, and Mr. Taylor selected Mr. Gamble for us, and from that time had charge of the development work on the Michel.

Q.—How many prospect tunnels were there around on that?

A.—Mr. Hemphill made a report of five or six. One is in a kind of out of the way place up the hill and was in the brush. From memory I would say it was in 170 feet.

Q.—Was there any of these places what appeared to be a coal vein?

A.—Yes, there was a number of them there that ran into about a five foot deposit of a very black material that had all the appearances of being coal. I know that when the different stockholders visited the property they would invariably say that it was coal and we had to explain that it was not coal.

Q.—Did you always explain to them that it was not coal?

A.—Yes.

Q.—Well, were they ever left with the impression in any way at all that that was a coal seam?

A.—No. There were pieces of coal—oh, from the size of your two fists down that we would run across in this tunnel and in these shafts.

Q.—Were the tunnels ever driven in beyond the point where coal should be found?

A.—No.

Q.—The dips of these strata of coal as you described on the Crown, is at about what angle?

A.—About twenty-eight to thirty degrees.

Q.—And towards what direction?

A.—Towards the west.

Q.—And can you give the time when you first examined these claims?

A.—That was very early in the spring.

A.—Of 1907?

A.—Six would be my memory.

A.—And can you give approximately the amount paid to the government in crown granting these four sections?

A.—That money was paid over to the Bank of Montreal and my memory is we paid in twenty-five thousand dollars.

The railroad was first inaugurated in 1908 and bill was passed in Parliament for our charter that year. Mr. Wayland, Mr. Hemphill and myself did that work, carried the expense, and then turned it over to the coal company. In organizing that railway company we acted through Mr. Bass, Secretary of Parliament, in Victoria. He is a barrister.

Q.—And in the organization of that railroad company did you follow the instructions and advice of Mr. Bass in the method of procedure, Mr. Belden?

A.—Entirely, Mr. Williams, to the extent that before we organized we even had Mr. Bass come down here and draw up these plans and so forth.

Q.—And the things that show in the minutes of the Crow's Nest & Northern Railway Company with reference to the organization of the company, was that the plan of Mr. Bass?

A.—Entirely.

Q.—And were the minutes and all of these things drawn by him?

A.—The minutes were outlined by him. There may have been a little change in the wording but not in the sense in any way. Our object in coal companies becoming interested in the railway was we felt that the more companies that were interested in the railroad the closer they would be tied to each other, the less liability of litigation among themselves and there would be a much better opportunity to finance them because of there being that much more commodity for a railroad. The purpose in securing the land of these coal claims along the entire valley outside of the question of the coal, was the value of the timber, it is very heavily timbered. Our valley there, is considered the most valuable piece of timber in British Columbia.

Q.—Now, on the question of the organization, the question of the management of these different companies, the Crown Coal & Coke Company, the Empire, the Michel, did you at any time attempt to dictate the policy of these companies, except to express your own opinion?

A.—No, Mr. Williams, I have always advised a larger board than the smaller boards than they originally had because of giving the different communities a representation on the board, and I would write them that our annual meeting would be next month, January, advise them to get together and

have a meeting and send in a committee and select at that time the man that they wanted to represent them on the board, and Mr. Wayland and I always voted for the same man that they selected to represent that community, and in the case of proxies sent to me they were voted according to these directions. There was only one time that we ever had any special effort to secure proxies and that was because it required a quorum and it not being the regular meeting I telegraphed to Walla Walla and these proxies were sent in the name of Mr. Hopson. I didn't do anything in the way of dominating the boards. Mr. Wayland and I have never had the control of any one of these boards. There were no dummy directors. We never have had any men representing us other than ourselves on the board.

Q.—What was the object and purpose, Mr. Belden of these different companies having the same fiscal agent, the International Development Company?

A.—Primarily we were about the only ones in Spokane that were in a position to take these offices. The stockholders lived in different communities and our office was practically the only one that could fill that. The question of economy entered into it very largely. There were times at the early organization of these companies that we made no charge whatever, to save the companies that expense. Had they each carried a separate

office, why it would have added practically three times as much expense.

The first year of the Crown Company I was made the managing director. Mr. Ferrell consulted the other directors at Milwaukee and wrote me offering me twenty-five hundred dollars for my services. I talked it over with Mr. Hemphill and Mr. Wayland and rejected that, saying that I felt the company could not afford to pay a salary. There was one year I did draw a salary from the Crown. I was giving three quarters of my time to the work of that company and I had a great deal of expense with it; it was the time we were very active in our work. I was working at the properties at Crow's Nest. I guess it was fifteen hundred dollars I drew for a year.

I built the wagon road. It took me practically all summer. It had been impossible prior to that time to get in with a saddle horse except by carrying an ax with you. Lamereaux and I blew all of the stumps and marked the road before the men would go to work in the morning and after they would quit, and through the working hours of the crew we worked right with the crew, either with the teams or with the men. Wayland was there with me on the ground. Mr. Butterfield, and Mr. Hample and Mr. Ferrell, were attending to stock sales.

The International Development Company was

allowed a commission on such sales as it made of Crown, but in that resolution each of the syndicate members were allowed full commission. Outside of that one year, our office never received anything in the way of salary. There has not been a time in the history of any of these companies but if they had to have money the International got it for them, and we paid the bills if they were not able to pay them. In four out of five sales, and probably a much larger proportion, the entire twenty percent was paid out to the man making the sale. If it became too heavy a drain on the International I would occasionally make a charge of two and a half percent, and once in a while five percent against this man, just according to how heavy it was draining on us, not with an attempt to make a profit, but to help bear my expenses in the field when I was helping the man. Was relving for profit on the development of the property.

We didn't have the control at any time, but we figured by selling the stock in Walla Walla and Payette and in these districts, by all working along the same lines we would have the control, protect our investment. They were mostly note sales and trades for land. What we purchased we would sometimes pay cash and in one case I remember we did turn one or two notes. In several cases we traded the land. In making these sales of personal stock we did not compete with the com-

panies. We aimed to work in conjunction with the company in keeping blocks of stock off the market that would interfere with the treasury sales. For instance, if one of the original syndicate members of the one hundred thousand shares would offer stock at less than the treasury price, we would try to trade this man or buy this stock from him so as to keep it from interfering with the sales of the treasury, when we would dispose of that stock. It was usually disposed for land, trade. There were a few exceptions to that in the Empire, I understand, but no exceptions to that in the Crown.

Q.—What was the reason, if any, that you did not take real estate for the Crown or the Empire treasury stock?

A.—For the reason that you would not realize on your real estate to get the required amount that the resolutions called for in the minutes. We had no authority unless we had the net amount to turn over to the company. We figured that we were assisting the company in doing this. In these personal sales transactions the International Development Company acted simply as a clearing house. What I was leading up to was that we would take what we had that we could turn to these parties and would try to replace it with something else, and as a rule we got mortgaged stuff and had to give unencumbered stuff away to the Eastern stock-

holders. There was more than the control of the Crown in the East, and largely among Mr. Ferrell's friends.

Q.—Now, with reference to the Empire property. Before this corporation the Empire Company went upon any of these stock selling campaigns, was that examined by an engineer?

A.—Mr. Gamble. He was with the Michel and with the Crown both, for over a year.

Q.—Do you know at whose suggestion this Empire property was acquired for coal purposes?

A.—Mr. Gamble told me to acquire the Empire property by all means. He said there was absolutely no question but what there was coal underlying it, and I remember very distinctly we were on the East side of the Crown Mountain at the time of this interview and he explained his theory thoroughly to me. That was prior to the incorporation of the Empire.

Q.—Now, Mr. Belden, were any coal mines ever opened up on the Empire?

A.—No.

Q.—Have you been over the property thoroughly?

A.—No. I have not covered the Empire very thoroughly. I have never been up only on one or two general trips there. I never attempted to prospect the Empire myself. The work that was

done on the Empire was under direction of Mr. Demmick and Mr. Bell. Mr. Bell is a mining man that the Payette stockholders requested to have charge of the work up there. About five hundred feet of tunnel, or four hundred and fifty was run. On the Empire we had not reached our solid formation or gone in sufficient to determine it.

Work has been suspended on the Empire and Michel because of the non-payment of our notes, a lack of funds. I think that less than ten percent of the notes have been paid that were taken for stock.

We discussed the bond deal very thoroughly at the Payette meeting. This was the time that was referred to yesterday in the testimony when Mr. Brainerd and Mr. Bell gave an interview on the property, and we discussed the bond issue and at that time our stock sales commenced to be very successful on these notes, and we had at that time one hundred and eventy-five thousand dollars worth of notes on hand, and I remember Mr. Wayland having a memorandum at that time showing just what the sales were, and the stockholders opposed the bond issue because they felt that in mortgaging the property for so large an amount it was going to embarrass us in the future, and they felt we could raise the money on our stock sales, so they voted down the bond sale. We told the stockholders distinctly how much we had on hand then, and we also gave them the estimate of the railroad.

In regard to commissions, there were occasional times that I was especially anxious to get funds we allowed agents twenty-five per cent, and on all of this stock that Mr. House terms personal stock, which was the original ownership in the property, we paid thirty percent on all of that. In the cases I mentioned before, if I was active in the matter and helping make the sale, I would charge a small amount.

Q.—Now, did you ever at any time represent to any one that the Michel or the Empire property was proven ground?

A.—No, I always spoke of them from a standpoint of the formation, what the other men had said, and it was rarely the case that I didn't have a local man that I could refer to who would speak of his opinion. We were continually sending out letters—for instance, you will find in our files there was often a man would get five and six invitations. If we took a conditional note that was to induce him to visit the property. If he couldn't visit it at that time we would extend that thirty days; anything to induce him to visit the property. We encouraged our salesmen to induce them to go to the property. Now for instance, Walla Walla, Mr. Hopson has spent fully half of his time with my salesmen to see that things were justly stated, and there was an official of the company there continually, and also to check on these notes. At Payette I had one of the directors, who was a salesman,

Mr. Gorton, and he always accompanied Mr. Ferris, and if it was a case like Mr. Vinson who had been over the property he would accompany them, or somebody else that had been over the property, or one of the directors. On the Empire at my suggestion they organized and sent up at their expense a man to investigate the property before organization.

Q.—Speaking generally now, and without particularizing, have you at any time endeavored to leave any false impressions through the mails as to the character of any of these coal claims?

A.—At no time, Mr. Williams. The stockholders always have a written report. We try to have some one go to the property just before the meeting and make a report orally. That did not appear in our records.

Q.—Referring to an exhibit that is a prospectus of the Empire Company that Mr. Bryan testified about; did your office ever use that prospectus?

A.—Not unless it was used under the instructions of Mr. Vinson. Mr. Vinson sent that draft in. I saw his instructions to Miss Covington. Miss Covington had it printed and I didn't see them until after they were printed. I criticised it after it was printed.

Q.—Did you ever use that with the name of the International Development Company agent or anything of that sort?

A.—No, Mr. Bryan and Mr. Vinson were the officers of the company and they got it out as officers of that company. The directors of the Empire usually meet at our office.

Q.—Now, referring to the railway right of way. Was that ever staked on the ground?

A.—Yes, the stakes are there. I think through 1907 and 8, or 1908, about that time. It was just subsequent to the charter. It was done under Mr. Diffenderfer and Mr. Ewen, two engineers, during the same period Mr. Gamble was there. I recall that it was an entire survey.

Q.—Well, how did it happen that there was this difference of the Empire line?

A.—We asked Mr. Lamereaux where that line fell, and he told us just over the creek, and right off at the foot of that hill; and just across the creek there is an old timber line, slashing, that followed right straight down and we always assumed that that was the east side line of the Crown.

Q.—Now, your entire dealings with this property, any dealings you have had, Mr. Belden, especially the Michel and the Empire, what has been your opinion or belief as to this property being coal property.

A.—I believe there is coal underlying both of these properties. The same vein. I have never met a man yet, until this case, and discussed with

Mr. Thomas, who took the contrary view to the view that I have.

Q.—Referring to the question of the railway stock that was given with the Empire, what would you say as to the amount of that stock that had anything to do with sales of the Empire Company, after its incorporation?

A.—Three or four shares. There were a few shares that were sold, and then we withdrew it, at the time of Mr. Butterfield's bond deal coming up, I telegraphed the men upon receipt of that cablegram.

CROSS EXAMINATION by Mr. Garrecht:

Q.—On what companies did Mr. Ferris receive any commissions for sales?

A.—On the Crown Company.

Q.—He never had anything to do with sales of stock in any other company?

A.—Never was a stockholder in any other that I know of.

Q.—In what company were there stockholders that you refer to as eastern stockholders?

A.—In the Crown Company. That was practically the only company in which stock was held in the east, with one or two exceptions.

Q.—Now you say that your relations with Mr.

Butterfield in the conduct of the affairs of this company were not pleasant.

A.—No, I did not say our relations were not pleasant. We have never had any special clashes.

Q.—Did you ever have any controversy in any of these companies?

A.—Well, had arguments a good many times, yes.

Q.—In what companies were these arguments, in which they lined up in force.

A.—Both in the Crown and in the Michel, but we generally came together on an agreement. Mr. Butterfield was a man that expressed his own ideas and I am a man that expresses mine, so we have had a great many arguments.

Q.—Well, isn't it a fact that you only had one real battle in the Crown corporation in which there was a difference of policy?

A.—No, we had several very serious ones. The votes may not be divided in the final voting, but we had some very abrupt arguments on it; adjourned meetings so as to take up the discussions between ourselves in the evening, and then we might have arranged a certain line.

Q.—Do you remember February 14, 1911, where the question of the right of Mr. Wayland to pass 150,000 shares of stock was questioned?

A.—Yes. I didn't listen to that meeting enough so that I recalled just what that clash was about, in that meeting.

Q.—Was Mr. Butterfield lined up with you in that clash?

A.—Mr. Butterfield was lined up with the other parties and when he came to the voting, voted our way on account of a change of policy which he explained afterwards, but I didn't know that until after the meeting.

Q.—But the records show that the vote of Butterfield, yourself and Mr. Wayland were cast on the same side in that controversy.

A.—Yes.

I will ask you to look at Plaintiff's Exhibit "186" especially directing your attention to the resolution passed by Sinard and ask you if that resolution had not been prepared in advance?

A.—I will say this, we never prepared a resolution expecting any officer to adopt a resolution. We may have drawn up a resolution as an outline of what they should approximately do, or what would be the proper outline, but it was never set down with any specific instructions to follow that wording.

Q.—Now, weren't printed blanks sent out from the office of the International Development Company with your name printed on them as R. G. Belden?

A.—Certainly.

Q.—Wasn't Mr. Kirk put on the board at a suggestion from you?

A.—He may have been put on the board at a suggestion from me, after talking with other stockholders.

Q.—You say, if I understood correctly, that the Michel property was valuable for timber?

A.—Yes.

Q.—Don't you know as a matter of fact that the timber on that land had already been covered by a timber license?

A.—Part of it had, but not the major portion of it. Now there was a little over three quarters of one section on which there was very little timber that was alienated by timber rights, on the other there was just about the amount to make up the balance of that section which was alienated. Mining licenses cover the timber licenses. We paid our ten dollars straight through and got all the timber. You couldn't saw it off and make it into timber and market it, no, you can't do that; "mining purposes" is very broad. In that sense you could use it for your buildings or any purpose connected with the property. I wouldn't have the right to market that timber. I have the right to that timber, as far as my mining license goes. My letter of June 16th is much plainer than the law on it, so if there

is any misunderstanding there, they would not have understood it by the coal mine act, and yet those people had a copy of the coal mine act, that is the representatives for each field, the president, Mr. Vinson, and others. I never did make the representation that the timber was worth what they were paying for the mine.

Q.—I believe you stated that Mr. Bass prepared the papers, resolutions, etc., for the Crow's Nest and Northern Railway Company. Now, who took care of the drafts and the arrangements for the minutes, etc., of the other companies?

A.—That would depend upon the secretary. Understand Mr. Garrecht, I have never had anything to do with any of the minute books of any of these companies. They were kept in my office but I am not a bookkeeper, and never have been secretary of any of the companies, and all of these books that have been introduced in evidence here were all kept in our office. It was one suite and a portion of it was used by the companies and a portion by ourselves.

Q.—And as you stated, when these other companies were too poor to hire office rent, or bookkeepers, etc., you folks furnished them, did you not?

A.—Yes, I am not ashamed of that part of it, the books were properly kept.

Q.—And they were kept to a large extent, as you claim, at your expense?

A.—As far as the secretaryship part of it, yes,

Q.—And your office or the International Development Company, had the say about who should have to do the work on these books; you hired them and paid for them?

A.—Not the International, Mr. Garrecht. The secretary of the company, of each individual company, I don't think I have ever dictated a copy of the minutes of any of these companies.

Mr. Brainard was secretary at one time as was testified yesterday, and did work on the books. Mr. Bryan at one time was secretary of the Empire Company, and he had the books down to Walla Walla. I believe Mr. House got the Empire books from Mr. Bryan at Walla Walla, if my memory is correct. The secretary of the companies had the minute books as far as I know.

Q.—Were these claims not turned over to the Crown Company?

A.—Yes, they were turned over to the syndicate members to the Crown Company.

Q.—Now you testified that you traced through this strata and found the same formation on the Michel as you did on the McInnis; is that correct?

A.—That is; I don't now what the Fernie shale is. I have heard them speak of the Fernie shale and I have always assumed that it was the shale

that was found in the location of Fernie, and there is one of the biggest mines right there at Fernie.

Q.—Then what were you basing your opinion on up there with reference to the Michel?

A.—On the observations that a man would make, from the average knowledge.

Q.—Just look at the side of the hill and make up your mind whether there was coal in it?

A.—I have worked in the mines. I followed the strata for instance, there was a strata of sandstone there they cut, some of them, ten or fifteen feet thick and other places where there are strata close to eighty feet thick, sandstone, and between there are strata of a certain thickness of slate and you could find these same strata on one side of the valley or on a relative position on the other side, you will find them in the same relative position.

Q.—Now you said the mountain tops on the Mc-Innis side were limestone formations?

A.—Yes.

Q.—Did you find the same limestone formation on the other side?

A.—Absolutely.

Q.—Do you know whether coal is above the limestone formation or below it?

A.—Coal is either above or below the limestone formation or in between it. The Frank mine, the

coal is between two limestone walls and is generally known all through that district as being between two limestone walls.

Q.—Who was this Mr. Thorn that you said you had a talk with before you located these mines?

A.—He had worked with the Canadian Pacific on the McInnis property and had done a great deal of that work there.

Q.—Where was it that you had this talk with Mr. Thorn?

A.—That would be prior to the application for the charter of the railroad, and that was the principal point that I talked with Mr. Thorn on, his figures on his railroad line there. I wanted to see if he had a permanent survey or just a projected line.

Q.—Where did this conversation occur?

A.—At Hosmer.

Q.—Now what did Mr. Thorn say about the Michel property?

A.—He told me that he had the opinion that the coal underlaid that side of the valley.

Q.—Did you talk with him particularly about the Michel location?

A.—I talked with him, explained where our ground was there, that it joined the Crow's Nest Pass Coal Company just to the north and laid just east of the McInnis property.

Q.—Were you asking his opinion as an expert on mines with reference to the Michel, or his opinion as an engineer about the railroad you wanted to put through there?

A.—The railroad is what I made my trip for. I am sure that Mr. Thorn told me that he believed there was coal on the Michel.

Q.—Do you remember being down at Freewater or Milton and having a conversation with Mr. Muir in which you were endeavoring to sell him some stock?

A.—I remember—the only sale that I remember with Mr. Muir was his purchase at the meeting.

Q.—Now, is it a fact Mr. Belden that eastern stockholders ever controlled the Crown Coal & Coke Company?

A.—At the time of this report that you were speaking of Mr. Garrecht, it was not only the eastern stockholders; it was some of the western stockholders that were with them. Now, for instance, Mr. Hemphill, voting with the east would have controlled the property, Mr. Hemphill, Mr. Butterfield, Mr. Arbucq was all with them.

Q.—Now a large part of the stock as I understand you was paid for in notes?

A.—Yes.

Q.—Suppose you would go out and sell shares of stock and have one hundred thousand dollars

worth of notes and then there would be a resolution passed turning over to the International Development Company a certain block of other stock, would they, in making these settlements or transfers would the notes be passed from one company's treasury to the other?

A.—From the International Development Company?

Q.—Yes.

A.—Yes, that is if I understand you, follow the outline of the minutes, their resolution. We would sell stock from the International certificate and afterwards that stock would be replaced to us by the certificate from the treasury.

Q.—Did you ever give any directions to Mrs. Shepard while she was your bookkeeper about what certificates these should be issued from?

A.—If I ever gave any instructions in regard to any matter in our books it would be simply maybe a charge in commission or something of that kind that I was familiar with. I am not a bookkeeper and not familiar with books.

Q.—Do you ever recall having directed Mr. Christopherson?

A.—I don't recall it. It would have been out of my line of work unless it would happen to be some little instance.

Q.—Now, in the transfer of the notes from one treasury to another, who checked over these notes?

A.—Mr. Hopson and I.

Q.—What part did Mr. Hopson take in checking over these notes?

A.—Why, Mr. Hopson and I would sit down and figure out how many had to go to the Coal Company and as I understand it and as I remember it, we made lists of these as we turned them over and signed and approved them. Our resolution provided that none of the notes should be due later than January 1st, 1913.

Q.—And did you have any system about where the long term notes went to and who the short term notes went to?

A.—What you are getting at is the fact that we would take the short term notes for ourselves?

Q.—Exactly.

A.—Naturally we would because we were advancing cash and we had to have cash coming in. That was proper.

Whereupon an adjournment was taken until 2 o'clock p. m. April 30, 1914.

MR. WILLIAMS.—We would like to put on a witness that just came in; we would like to withdraw Mr. Belden or rather, put this other witness on before recalling him.

R. R. GAMBLE, called and sworn as a witness on behalf of the defendants, on direct examination by Mr. Williams, testified as follows:

My name is R. R. Gamble, and I reside at Ogden, at present and reached Spokane this morning. My business is that of mining engineer and I have had considerable experience with coal mining. I graduated from college where I studied geology and I have had experience with Taylor and Sullivan for four years during which time I was engaged in coal mining. In my occupation I have frequently examined and experted coal properties, in twelve different states, covering a period of seventeen years. I was up in British Columbia in the Michel valley and tributary and examined the properties in July, 1907, from July, 1907, to March, 1908. I examined the mines of the Crow's Nest Pass Coal Company several times, also the Fernie and Michel and have also been over the McInnis or Trites Group several times and examined the formation. I was clear up to the top of the mountain on which the McInnis Group is located, so I could see west from there. I have also examined the formations and conditions on the east side of Michel Creek. I examined the west slope of the mountain which has been referred to here by the witness on which the Empire and Michel is located, as the Sentinel Range, but I made no examination on the east side. While I was in that section I assisted in building wagon roads and opened prospect holes and drove tunnels. We did considerable of this work on the Crown property and on the Michel during the period which I have referred to, from July, 1907, to March, 1908.

I have also been over the Empire property several times.

MR. WILLIAMS.—Now, Mr. Gamble, what would you say as to whether or not the strata of coal that are found on the west side of the Michel Creek on the McInnis property and the Crow's Nest Pass Coal Company, whether they continue under the Michel claim?

A.—Yes, there are outcroppings in the creek that show that the coal continues on east. There is limestone above the outcroppings found there.

Q.—And when did you find these outcroppings in the creek?

A.—I think that was in July or August, 1907.

Q.—What other facts are there that indicate to you that the formation continues under the Michel?

A.—Well, there has been an upheaval there and the mountain has come up on one side and gone down on the other, and that has formed a valley and it is reasonable to suppose that the coal went on through before this break. The east side of the Crown was very precipitous. The west slope was probably thirty or forty degrees. That is the outcropping of what is known as the butt of the coal, and breaks off much sharper than the natural slope, as it is when it is first formed.

Q.—Practically, what, if anything, does it indicate as to whether there has been that upheaval where one portion has slid past the other?

A.—Well, if it had been formed in any other way it would be a gentler slope; that is, if it had been formed by erosions or any other substance it would be more broken. There are lots of places where there is limestone both above and below coal. Coal is found in nearly every stratification there is. On the McInnis group side I found coal both above and below. There is limestone stratification all through the section there.

Q.—What, if any, advice did you give either Mr. Belden or Mr. Wayland as to the presence of coal on the Michel?

A.—I told them that there was no doubt that there was coal there, just the same as in the McInnis and the Crown; and advised them to drive a tunnel.

Q.—What advice, if any, did you give them as to these veins continuing into what is known as the Empire property?

A.—I advised them to acquire these claims.

Q.—What, if anything, did you say as to the coal stratas continuing into the Empire?

A.—I said that they continued undoubtedly and that it would be easier to mine on that slope than it would be on the east slope of the Crown. I think I remarked it was a toss up as to which was the better investment. It would be cheaper to mine on that slope than it would be on the Crown slope, opening a tunnel on Michel Creek. The loss would

be comparatively small by erosion or by the elements, but the advantage would be in favor of the coal that is lying to the east of the creek, as it stretches towards the creek. In the McInnis and the Crown and the Empire up near the northwest corner of the Empire there is an outcropping there. The sun would strike it and it was always very prominent; and the same formation was on the other two properties only not so striking. We often spoke of going up there but it was a hard trip and I never went up to see what it was. That would indicate that it was originally continued straight through on a horizontal or the same strata or the same plane as the north east corner of the Empire claim clear through to where that same outcropping was on the McInnis claims. That same structure must have been right straight through at one time. In the tunnel on the Michel claim there was shale and sandstone all the way through. It was kind of a mixture, sort of a stratification; be shale and sandstone and then shale and slate, and so forth. We were not in far enough to expect to find the coal that we found in place on the Crown property or on the McInnis claims. What led us to start the tunnel at the point at which we did, there was a small prospect shaft there in which there was several little seams of coal very plain, probably an inch or half an inch through. Q.—In good quality of coal? A.—Oh, that was just a streak. I don't think we ever tested that as to its quality, but that would

indicate that there was coal there, and there were some—I didn't call them chunks. A half an inch thick probably was the largest pieces we took out of there, they were right out of the strata. I think there was slate on one side and slate on both sides perhaps. That indicated that the coal was in place; that there was no fault in the formation; there was no break in it; that if we continued the distance that we had calculated we would strike the same vein of coal that we found in the Crown and McInnis. I think we encountered about twelve veins on the Crown property, where we dug prospect holes.

On the Michel we dug nothing only the tunnel because we expected to find no outcroppings on the west slope and we simply drove the tunnel without any prospect holes.

Q.—Do you recall any incident, Mr. Gamble, of Mr. Thorn of the Crow's Nest Pass Coal Company being over there on the property?

A.—Yes, he and I made a trip over the Crown Mountain.

ELMER BELL, called and sworn as a witness on behalf of the defendants, on direct examination by Mr. Williams testified as follows:

My name is Elmer Bell and I reside at Payette, Idaho; I came to Payette in '87 and have made it my home ever since. I have been on the Empire

property and I think I went there first in July, 1910, and remained there until in January, 1912. I was at one time employed on the Empire. During the time I was there I was employed on the Empire continually as superintendent. I superintended the driving of the tunnel and the doing of the work on the tunnel. I was sent up there at the request of the people in the town where I lived, the stockholders in that section in the Empire. I was acquainted with most all of them. Prior to that time my experience as a coal miner dates back to the time I was a little boy. There was coal mines all over the country where I lived and I have worked in them I don't remember just how long but I have had experience along that line ever since I was a little boy. I have always examined coal formation. I was always looking at the different formations that the coal occurred in. I did that for the reason that I wanted to see if I could find any coal on my father's place, and I wanted to get a line on all the formations that coal lays in to see if I could find anything there. I think I have become familiar with coal formations generally. The following year after going into the Michel section, in 1911, I examined the coal formations. I had more time then and I examined the formations pretty thoroughly, from the Michel up to the Crow's Nest Mountain. I also examined the stratas on the Michel and the Empire, and I came to the conclusion when I first looked over the property, that the Empire was just

as good as the Crown. That was my first conclusion, and I have not changed it. I had rather have the Empire after what I saw of it than to have the Crown. The last time I measured the tunnel on the Empire it was 447 feet; had not reached at that time the point where we expected to find coal. A great many of the prospective investors in coal stocks come up on the ground. I showed them over when they came, showed them everything I knew, and there was not anything concealed from them by me. There must have been fifty or seventy-five come up during the summer months.

H. T. FRENCH, called and sworn as a witness on behalf of the defendants, on direct examination by Mr. Williams testified as follows:

My name is H. T. French and I live at Corvallis, Oregon. I am connected with the agricultural college there. In 1908, 9 and 10 I lived at Moscow where I was connected with the State University of Idaho, as director of the experiment station.

Q.—Have you had any education at all along the line of geology? A.—Geology was taught in my course in college, in the scientific course and I had a short course in geology.

Q.—Outside of that have you had anything at all to do with geology since coming out of college?

A.—No, sir, I have not.

Q.—Have you taught it since? A.—No, sir.

I invested in the Michel and visited the property I think my first visit was in 1908 and examined the property at that time. Examination was not so very thorough. I visited the McInnis property and the Crown at that time and also a portion of the Michel, went over a portion of the ground and was in tunnel which was then there. I made my first investigation before I invested in the property and made another investment afterwards, bought more stock. No misrepresentations were made to me of the situation so far as I know.

On CROSS EXAMINATION by Mr. Garrecht he testified as follows:

After I was up there I invested in the Crown principally although I think I took some stock after that in the Michel; I am not sure but I think I did. I took 3000 shares in the Michel and I can't swear now whether it was just prior to my visit there or just after that visit. I took it through Mr. Butterfield, my acquaintance with him largely and on his recommendation. I did, however, afterwards invest in the Crown.

(Witness excused.)

R. G. BELDEN, recalled for further direct examination by Mr. Williams, testified as follows:

In regard to the testimony of Mr. Hogue regarding a sample of coal, that sample was sent to him. It was a sample received from the Michel. The question of consolidation of these various com-

panies was discussed several times with various stockholders. I think that was in the year 1911. I was visited by a committee and asked if I would assist them and I told them I would vote with the majority of the other stockholders. In the early days I was favorable to the consolidation but in the latter days only to the extent that it would work out to the advantage of building the railroad. If the companies were in a position to assist in that way, then I would have favored it. Wayland and I were not agreed on that subject at all times, and we have had arguments concerning it. In the letter which has been introduced in evidence written to Mr. Muir, stating something about a difference of opinion, that was in reference to the consolidation of the companies. I do not know anything about bookkeeping and do not know the difference between a ledger and a journal without seeing it marked. I never have made an entry in my life. I would not give a bookkeeper any instructions on an entry unless it would be simply a division of commissions between agents.

I remember a trip into Idaho with Mr. Ferrell but I do not recall any discussion with him in regard to the Empire. I never made the statement to him that I knew there was coal in the Empire. I may have made the statement to the effect that it was not proven ground, but I don't think I made it to Mr. Ferrell.

I did not give Mr. Hill a written guarantee. I

came into the office and had the Michel Coal Mines Company write him and make him the promise as I had, verifying my statement to him. The letter that was written is Defendants' Exhibit 77 for identification and it shows the understanding with Mr. Hill.

DEFENDANTS' EXHIBIT "77" admitted without objection:

I never represented to Mr. Lloyd that these lots were being transferred to the Michel Company. I had no talk with Mr. Lloyd at all. The deal was closed through the mails. The Lloyd subscription to Michel stock was a treasury subscription and I do not know how it got on the books as personal except through error, and I had never had my attention called to it before that the error had occurred. It was not intentional in any manner. The books of the Michel, Empire and Crown have been audited two different times, I believe, by certified accountants and once by Miss Burke. At the time the books were audited by LeMaster & Cannon, we felt satisfied that Mr. Christopherson was not able to handle the books and we asked Mr. LeMaster to select a bookkeeper and he selected Miss Burke.

In reference to the Walter J. Woods transaction, I told him that the stock he was getting was personal and wrote a receipt for him to sign to that effect. The receipt has not been changed or altered

in any way since Mr. Woods signed it. The matter of selling personal stock was fully discussed at the meetings at Walla Walla and Payette and the purpose of this was in order to secure control, fifty-one percent of the stock. The fact that we were making purchases from time to time was discussed. I was asked that question and I always explained it was in protection of the market, and I continued to make purchases after that. I did not represent to any of these people with reference to the railway stock of our own, that the one hundred dollars was going to be turned over to the railway company. It was stimulate the interest of the Empire Company in the railroad, is all. In reference to a statement made to Mr. Bryan in reference to sweetening a sale with Crown stock; that was at a time when I was trying to absorb a large block of Empire that had come onto the market and I was willing to allow some of my Crown stock to go out to induce a trade, to be absorbed; the Crown was spoken of as an investment and the others were the speculations, and that they could mix the two in a trade. In none of these talks that I have had with anyone was anything said about any of this real estate that may have been obtained being used to develop the property. The real estate was not used in the development of the property, but it was used to the good of the company in keeping the market protected from the floating stock.

A letter identified by the witness admitted in

evidence and marked DEFENDANTS' EXHIBIT "221."

Mr. Bass is the one who organized the company; he is an attorney at Victoria.

Mr. Wayland took Mr. Brainerd over the property and discussed the right of way with him. At that time the right of way stakes were set throughout the entire distance. I never made the assertion to Mr. Brainerd that I was taking the deed in my father's name. Mr. Brainerd frankly admits it now, in discussing it. I said nothing about my father being in close touch with the Bank of Montreal. He has not been active in my memory.

At the Payette meeting Mrs. Alden came up to me with Mr. O'Rell and wanted to trade this property that she had there in Middletown, just some vacant lots. I told her that I was very busy. She was insistent and finally I said, "If Mr. O'Rell will go over tomorrow and look at the lots and see it is all right, I will do it." Mr. O'Rell did that and came back and said it was all right. I was still busy, so I sent Mr. Wayland over to the house and I didn't discuss it with Mrs. Alden at all, and the deed was made out in Mr. Wayland's handwriting and is here. In all of the deals with these companies there was never a time that property was taken in exchange for treasury stock.

Deed admitted in evidence without objection and marked "DEFENDANTS' EXHIBIT "223."

I did not say to Mrs. Alden that I would not take five dollars a share for my stock; I had no chance to discuss the property with her. I don't know what was the character of these lots. All we could sell them for was twenty-five dollars.

Exhibit "188" admitted in evidence.

In reference to Plaintiff's Exhibit 187 being a receipt signed by Walter J. Woods, Mr. A. E. Livingston, who signed as a witness was in the office when I made the sale and signed it. I did not tell Mr. Cooper that I was going to use this land and borrow money on it for company purposes. The price of thirty-seven and a half cents to Mr. Hayton was discussed at the meeting. I told Mr. Kirk that I believed the Crown veins underlaid the Empire. I had no other information except Mr. Hemphill's statement, the engineer's report and my own ideas. In reference to the representation concerning the right of way made to Mr. Kirk, that is covered in a letter which went out to all stockholders, which dealt with the right of way and said that we had most of the right of way, which was a fact. We had all of the right of way except 4.8 miles out of the twelve.

Defendants' Exhibit "193" is in my handwriting, except the signature and it is in the same condition now as it was when it was signed.

Q.—Has anything at all considerable been realized out of the notes? A.—No, nothing particular.

Q.—And the Mills Syndicate Coal Mine stock, anything realized out of that? A.—No.

Q.—And the Preston Farms interest, \$52,937.00?

A.—We got about ten thousand dollars out of that with some stock.

Q.—The Riparia Orchard Tract, \$45,000.00; anything realized out of that?

A.—Lost \$13,000.00 besides the property.

Q.—The property is gone?

A.—Yes, foreclosed and sold.

Q.—The other real estate at \$92,000.00; what has become of that?

A.—I think Mr. Wayland has one that is worth about five hundred dollars left; I haven't any out of it.

A letter identified by the witness admitted in evidence without objection and marked DEFENDANTS' EXHIBIT "224."

Q.—And the moneys that have been raised by these different companies, so far as it has been disbursed through your office, Mr. Belden, how has it been disbursed with reference to the development work on these properties?

A.—Used absolutely for it.

WHEREUPON an adjournment was taken until 10 o'clock A. M. 1914, at which time court duly

convened pursuant to adjournment; present as before.

R. G. BELDEN resumed the stand and on cross examination by Mr. Garrecht, testified as follows:

Q.—I believe when I finished the other day my part of the cross examination we were talking about notes. I understand in this exchange of notes, Mr. Belden you took the short time notes. Is that right?

A.—Why, we were advancing cash and in order to get our cash back usually took the short time notes; not always. I don't recall any notes that were secured. There may have been some. I recall the G. W. Smith note. It was not secured at the time we took it but later on it was secured. We kept one of them and two went to the company. Mr. Smith secured the note I had. I do not recall a case where notes were taken that were secured by the stock that was issued, as collateral security.

We represented that we did not have 4.8 miles of the right of way; we did not represent that we had it all.

A letter admitted in evidence and marked PLAINTIFF'S EXHIBIT "235."

I presume I may have written the letter to which you refer dated November 18th, 1910, to Miss Mary K. Moriarity, but that does not say that I have acquired all the right of way; and I presume that letter was written just at the time Mr. Wayland and

Mr. Butterfield were negotiating and did have an agreement on the balance of the right of way.

Q.—I want to call your attention to Plaintiff's Ex. 65, stub certificate No. 698 issued to Mary K. Moriarity transferred from International Development Company and ask you if that is correct?

A.—That comes from the International all right and it may be the one. I am not disputing that, but that can't be a transfer.

Q.—The books in evidence show that the cash did go to that company, does it not?

A.—Yes, sir, that is our commission. I don't deny but what the International got the cash on the Mary Moriarity sale. That was the distinct understanding.

The various companies owed the International Development Company for money advanced and the Empire still owes the International right now. I have not looked up in regard to the Michel but it is more than likely they do. That was cash advanced, not notes, that the Empire owes us. We always turned notes over in exchange for stock that we had sold. I don't think you can show in any way that it was our general practice to turn over notes in a larger amount than the stock we got so that these companies would be owing us right along, because that was not the intention, and that would be worked out as nearly as the bookkeeper could work it. If it did happen I would not say that the bookkeeper would be at fault because some-

times we could not divide the notes. I have testified that we paid as high as thirty percent for the sale of personal stock, and the agent making the sale got the commission. Mr. Butterfield and I had discussed with the Bank of Montreal the matter of the bond issue.

PLAINTIFF'S EXHIBIT No. "226" admitted in evidence without objection.

It was immaterial to the stockholders whether it was bonded in this country or a foreign country, but the question whether a bond issue under these conditions was desirable to the stockholders.

Q.—Then as a matter of fact the eastern stockholders never did control unless they had somebody in the west to stand in with them; is that correct?

A.—There was never an issue on the control until the break with Mr. Ferrell and Mr. Hemphill and a few of the other western stockholders, and in that event the east had the control; that is, we would speak of it as the eastern stockholders having control, the eastern faction.

Q.—Now, wasn't that control brought about by Mr. Hemphill and Mr. Butterfield both voting with the east?

A.—Mr. Wiseman also voted with the east and Mr. Arlbury, he was a western stockholder.

Q.—If the western stockholders voted together the east could not have had control?

A.—I think not.

Q.—Now, some of the stock of the Crown Coal & Coke Company was held in the name of W. A. Hemphill and L. Whitney. Didn't that stock belong to the International Development Company?

A.—Some of it did.

Q.—Who did the other part belong to? A.—Mr. Hemphill made the arrangements and I am not familiar with that.

Q.—Then what he stated would probably be correct?

A.—I wouldn't take exception to Mr. Hemphill's testimony on that.

Q.—Who owned the stock that was issued in the name of Steve Brown? A.—The International Development Company finally owned it.

Q.—They had it under control all the time after it was issued, didn't they, in their charge? A.—Practically so, Mr. Garrecht.

Q.—That was one hundred thousand shares of the original issue, was it? A.—Yes.

Q.—I now show you Plaintiff's Exhibit 75 for identification and ask you if that was sent out from your office by the Inland Surety Company?

A.—I was not in the city at the time that that report came in and at the time that that slip was printed.

Q.—What date was it it was sent out, if you recollect?

A.—As near as I can state probably it was sent out by the letter that you have produced here of February 14, 1906. I was at Hartline and would get in about one o'clock in the afternoon.

Q.—You say you think you were in Hartline on the 14th of February, 1906?

A.—No, I say I arrived from Hartline at one o'clock on the 12th, and your correspondence here shows that was sent out on the 14th. It couldn't possibly have been reproduced and in the mail within that time. I got back about one o'clock the 12th.

Q.—Now, I will ask you as a matter of fact were not these things disseminated from your office with your knowledge?

A.—No.

Q.—I will ask you to examine this memorandum marked "Important" and signed R. G. Belden, and ask you if you left that memorandum in your office?

A.—Yes, I did. That is along the same line as I just explained to you. The commission went to Faires.

A letter identified by the witness admitted in evidence without objection and marked PLAINTIFF'S EXHIBIT "227." Other letters identified by the witness marked PLAINTIFF'S EXHIBITS "228" and "229" admitted without objection.

Q.—You also stated, I believe, that you wrote out and got proxies from different stockholders?

A.—We did at times, yes. A man might send two Empire proxies and one of them would be filled in with the name of the Crown, in the office.

PLAINTIFF'S EXHIBIT "230" admitted without objection.

I have always been interested in who were the directors. The committees were in the habit of calling a meeting and selecting their names and I would vote for the men that they would select. In fact, Payette would vote for the men that Walla Walla selected, and Walla Walla would vote for the man that Payette selected.

Q.—You wrote a letter like this to Mr. C. A. Bryan—(Referring to letter of December 20th, 1909)?

A. I never wrote that and that would not be proper. I think I was along the time he went up to the property. I planned to get everybody that we could to visit the property but he did not go according to a plan at that time.

A letter identified by the witness admitted without objection and marked PLAINTIFF'S EXHIBIT "231."

A letter identified by the witness admitted in evidence without objection and marked PLAINTIFF'S EXHIBIT "232."

I don't know as we ever had control of the Empire, that is, by our stockholdings.

A letter admitted in evidence without objection and marked PLAINTIFF'S EXHIBIT "233."

Another letter admitted without objection and marked PLAINTIFF'S EXHIBIT "234."

A letter admitted in evidence without objection and marked PLAINTIFF'S EXHIBIT "235."

Two other letters admitted in evidence without objection and marked PLAINTIFF'S EXHIBITS "236" and "237."

I always aimed to have a director of the company with the salesmen. I did not always have one with me. In most cases I did.

Three letters identified by the witness admitted without objection and marked PLAINTIFF'S EXHIBITS "238," "239" and "240."

I am not familiar with the 97 shares of railroad stock that were given as a bonus with Empire stock. I assisted in making the deal with Mrs. Inman, but Mr. O'Rell was the one that introduced me. I did not go to her home but as I remember it she had a little bakery or something of that kind and I went into the place there with Mr. O'Rell. I did not tell her that the Empire stock was as good as the Crown. I remember very distinctly selling the last one hundred shares to Mrs. Harrington. I never told her that the Empire claim was a solid mass of coal.

REDIRECT.

Q.—And in this letter where you speak of fifty thousand shares of the Michel that has been sold and twenty-five thousand Crown, what is meant there or what was the purpose of telling him to mix considerable Michel with the Crown?

A.—Simply that I had accumulated that; it had come in the open market and consequently I had to work that off to protect the market further.

On RECROSS EXAMINATION by Mr. Garrecht he testified as follows:

Q.—You don't know, never did know, and never kept track how much your personal sales were?

A.—That would be an immaterial point.

Q.—Wasn't the method that you employed to sell out all your own personal stock and then replace it with stock that you purchased with notes from the treasury?

A.—Such a condition never existed. I kept pretty close track of the stock sales but not of the entries. Miss Covington always kept track of the notes, had a note record that I could refer to if I wanted to see about an individual note. I think the prospectus is very clear in regard to the figures about the Michel and do not think there is any reason why it should mislead anybody. The Michel mine is a large producing property and we did not pretend to even have a camp equipment at that time.

PLAINTIFF'S EXHIBITS "241" and "242" identified and admitted in evidence without objection.

On REDIRECT EXAMINATION by Mr. Williams he testified:

The Michel mine that I spoke of belongs to the Crow's Nest Pass Company. The town is named Michel and we speak of that as the Michel Mine of the Crow's Nest Pass Coal Company. In regard to the letter about reducing the force after the property was visited, we realized at that time that the force had to be reduced and it was going to be taken up with the board. They were simply going up there and the men would verify the statement we had already made that there were so many men, and from that time on it would be reduced. As stated there, we would not be able to exceed so much any month.

(Witness excused.)

ANDY GOOD, called and sworn as a witness on behalf of the defendant, on direct examination by Mr. Williams testified as follows:

My name is Andy Good and I reside at Crow's Nest, British Columbia, and have resided there for the past sixteen years. That is about from six to twelve miles from the Empire and the Michel. I am acquainted with both the defendants and Mr. Lamereaux. I wrote the letters marked Defendants' Exhibits for identification No. 81 and 82 and wrote

both of them at the request of Baptiste Lamereaux from his dictation and at his request and on the date they bear.

The letters admitted in evidence and marked DEFENDANTS' EXHIBITS "81" and "82."

Prior to that time I drew a sketch of the coal claims from Mr. Lamereaux's dictation, probably about sixty days before these letters were written. He represented to me six veins from two and a half feet to twenty feet. During the time since sometime in 1905 both Belden and Wayland have spent considerable time in that country every year.

On CROSS EXAMINATION by Mr. Garrecht he testified as follows:

I do not know with reference to what property the sketch was made.

(Witness excused.)

W. B. SHAFFER, called and sworn as a witness on behalf of the defendants, on direct examination by Mr. Williams, testified as follows:

My name is W. B. Shaffer and I reside in the city of Spokane and am employed at 6 Post Street, in the Kronenburg Liquor Store, as a barkeeper. I was there on the evening of April 20th of this year. On the evening of that day Mr. F. L. Ferrell came into the saloon and said in substance as follows:

"That God damned Belden don't know me.

Before they are through with me they will know me for God damn them, I am out here to send the sons of bitches to the penitentiary."

On CROSS EXAMINATION by Mr. Garrecht he testified as follows:

At the time he said this he looked as though he had had a few drinks; he appeared to be intoxicated, he had a few "shots" or he wouldn't have talked as loud as he did.

(Witness excused.)

A. E. WAYLAND, one of the defendants, after being first duly sworn, testified on direct examination by Mr. Williams as follows:

My name is A. E. Wayland and I am one of the defendants in this case. I am thirty-six years old and I have resided in Spokane since 1903. Mr. Belden and I formed the R. G. Belden Company, a co-partnership and went into the real estate business. Later we formed the R. G. Belden Company. Our principal business was handling Lidgerwood lots for Dr. Byrne. I then became one of the incorporators of the International Development Company. Prior to that time I had never had any experience in coal mining. I first went into the coal fields of British Columbia in the spring, in March of 1906 with Mr. Belden. We went into the Michel section, went to a cabin of Mr. Lamereaux's up by Michel Creek on the north fork of Michel Creek up where the properties now are. The time I

acquired my first knowledge in regard to the coal showing was when I made this trip in March of 1906. The Crown was organized the following fall, I believe in August.

I know F. B. Green, the engineer. Mr. Green and Mr. Hower went up there in the spring of 1910 for the purpose of making a joint report. Mr. Hower had been over the property the previous August and had seen all the veins. We were on a hunting trip. As we went over the property I picked up some sandstone which was identical with the strata overlaying the top measure on the Empire, and when we got up on the mountain and found the sandstone overlaying the top coal vein, the large coal vein on the Crown mountain, we compared the sandstone and I asked Mr. Green what his opinion was in regard to coal on the other side, on the Empire and he remarked that any damned fool would know that; and he went on to explain his theory. Prior to the organization of the Empire I had a talk with Mr. Gamble and he explained to me the formation as I have explained it here only he told me that the coal, the same veins of coal overlaid both sides of the section. I believe that to be correct. I never represented to any proposed investors that coal had been found in place on the Michel. We were trying to get them to go up there and if you misrepresent the mine before he goes, you are sure not to sell him after he gets on the property. As to the Empire I also told them

the exact condition. When I took men in there to examine the mine I showed them everything I could think of. I asked them if there was anything else they wanted to see, and if some fellows came up who were a little suspicious and wanted to stay another day I would stay up with them and we would go anywhere. We always encouraged people to go in and look over the property. As to the right of way, we never represented anything other than the exact situation, went into details and usually showed a map and plat, showed them the cross section stakes and explained it all to them.

In regard to the subscription of twenty-five dollars made by Mr. Lloyd for Michel stock, that was supposed to be treasury stock. The books show now as I understand that the mistake was made, but I never knew of it. A small transaction like that it was never called to my attention, it was handled entirely by the bookkeeper. I was not aware of this mistake until I heard it here. It was not intentional in any manner.

These floating stocks were also offered to others to take them if they wanted them. After we acquired these stocks we were unable to hold them because we did not have the necessary capital. I never knew of any instance where property was taken in exchange for stock, where it was represented that the property was taken for the companies and I never heard of Mr. Belden making such statements while I was with him. I never at any time

in making sales of stock represented to anyone that it was treasury stock when it was personal, nor did I ever hear Mr. Belden do so. I was in the office when the Walter J. Woods deal was made, the ten thousand dollar note. I heard the discussion. Mr. Woods and I went over the property and I had returned with him, and Mr. Belden closed the deal but I was present in the office. We showed him the commission of the railway, the charter, leases, licenses and the crown grants. I heard the discussion as to the kind of stock he was getting and it was personal stock and he signed a receipt for it, and I was there when the receipt was signed and saw him sign it.

I closed the deal with Mary J. Alden. I never heard anything said to the effect that the stock of the company would not be sold for five dollars a share. I told her it was personal stock.

With reference to these different companies, prior to the election of directors in the different companies I never knew of myself or Mr. Belden having any arrangement with the people who were elected trustees that they would act with us. I had not formed any combination at all to control the meeting of the stockholders of the Crown which was held in January, 1910, where there was a fight for control and with our own stock we did not have control.

CROSS EXAMINATION by Mr. Garrecht:

The Inland Surety Company was a co-partnership and after that co-partnership was dissolved there is a letter here signed Inland Surety Company with my name underneath. Oftentimes Mr. O'Brien or Mr. Hemphill or Mr. Belden would possibly write a letter or possibly myself, just as a matter of getting facts together and then the letter that was sent out might be taken from this separate letter that had been compiled. Just why my initials are on there I haven't the remotest recollection. I do not think you have any letters with my signature on but what I am willing to say that I signed them. I would say that was a correct statement according to my understanding at that time.

MR. GARRECHT.—We will offer that in evidence.

THE COURT.—It will be admitted.

The letter and newspaper clipping admitted in evidence and marked PLAINTIFF'S EXHIBIT "243" and read to the jury.

Q.—Now, Mr. Wayland did you also send out letters with a sort of a sketch of resolutions that were to be offered at meetings that were to be held?
A.—I did.

Q.—I will ask you if you sent this letter of January 21st, 1911, to Mr. Simard?

A.—That is my signature, my dictation mark on it.

Q.—That letter was sent out, was it?

A.—I couldn't tell you that; I never mailed the letters.

Q.—You dictated it, though?

A.—Evidently I have signed it. I haven't read it over yet but I probably dictated it, yes.

MR. GARRECHT.—I offer it in evidence.

THE COURT.—It will be admitted.

The letter identified by the witness admitted in evidence and marked PLAINTIFF'S EXHIBIT "244."

Q.—Well, from the time that you located the Crown most of the efforts put forth were in developing the Crown, were they not?

A.—No. No the efforts the following year was put forth on the Michel and on building the wagon road.

Q.—Now, as a matter of fact, Lamereaux never wrote you anything about a twenty foot vein, did he?

A.—No, he wrote that he found a vein of coal and I always understood, that is from Mr. Belden and Mr. Hemphill, that it was a twenty foot vein and it was generally supposed among prospectors that a twenty foot vein extended over on this side of the mountain.

The letter of May 21, 1910, written to Mr. R.

G. Belden, "A.E.W.-R.C." in the lower left hand corner, sounds very much like my dictation.

MR. GARRECHT.—We offer it.

THE COURT.—It will be admitted.

The letter admitted in evidence and marked PLAINTIFF'S EXHIBIT "245."

A.—Why, the Empire needed the money worse at that time; and the reference to Mr. Butterfield there—I was up with Mr. Butterfield and Mr. Wright, Wright and Palmer, went over the property and from the way Mr. Butterfield handled the situation—he refused some proposition that I made—I suspected that he was on both ends of the deal, both with Wright and Palmer and with the Crown Company, and I referred to it in this letter here to Mr. Belden.

Q.—Now, you accompanied Mr. Belden to Walla Walla, Freewater, and Payette when you were having these meetings, made talks with Mr. Belden?

A.—Yes, in 1910 I was with Mr. Belden there. Other meetings were held in 1909. We held a meeting in Payette in 1910 but other meetings I was not present; I was at the Ransom Building at Walla Walla with Mr. Belden.

Q.—Did you make a talk on geology at Freewater at any time?

A.—Yes, and Payette in 1909.

RE-CROSS-EXAMINATION.

Q.—I will ask you if you dictated that letter to Mr. Dimmick? A.—Yes, sir.

Letter admitted in evidence and marked PLAINTIFF'S EXHIBIT "246."

RE-DIRECT EXAMINATION by Mr. Williams:

Q.—What was the reason that you desired Dimmick to keep the main force of men at work there on the job until these people came up, who were coming up to visit the property?

A.—We had represented there would be so many men at work there and we wanted them to stay there until they got up to see the property.

(Witness excused.)

A. HOBSON, called and sworn as a witness for the defendants, on direct examination by Mr. Williams testified as follows:

My name is A. Hobson, and I reside in Walla Walla County near Prescott Junction. I am engaged in the business of farming. I have been where I am at present for about two years but have been in the country though for several years. I am past sixty-three years old. I am acquainted with Mr. Belden and Mr. Wayland, having become acquainted with them I think in the spring of 1909. When I first met Mr. Belden he came to my house. I am a farmer. I have been an owner of stock in the

Crown, Michel and Empire. I first purchased through Mr. Belden in 1909. At one time I was on the Board in the Empire and later on the Crown. I think I served on the Board of the Empire for about two years at different times. I was never on the Board of the Michel. I never went on the Board of any of these companies under any arrangement or agreement of any kind with Belden or Wayland and while I have been on these boards I have never at any time done anything other than vote my convictions. We would sometimes talk matters over but neither Belden or Wayland tried to coerce me into anything or dictated. I always tried to do what I thought was best for the companies. Neither Belden or Wayland have ever attempted to my knowledge to effect any combinations or anything of that sort further than to give the Board recommendations, which would be among ourselves. I don't remember that I ever heard Mr. Belden represent to any prospective purchasers that coal had been found in place on either the Empire or Michel; I don't think so. He has said that he believed there was coal there. I have never to my knowledge heard him represent that he was selling treasury stock when he was selling personal stock. I always understood it was for personal stock whenever they traded for real estate or property like that. I am the same A. Hobson who acted for these coal companies on the question of dictating a division of the notes after sales were made.

There was a time or two I think I helped to buy them up. Mr. Belden sent me a list down to Walla Walla of the notes and I approved and returned them. I haven't any complaint to make of the division. I thought it was fair, so far as I was able to judge in the matter.

On CROSS EXAMINATION by Mr. Garrecht he testified as follows:

I own some Empire stock and secured shares of the railroad stock with it. I don't remember whether there was anything said as to what was done with the money derived from the sale of the railroad stock. I don't think there was anything in regard to that. For each five hundred dollars worth of Empire I got a share of railroad stock. My understanding was that a portion of the five hundred dollars was to go into the railroad.

On REDIRECT EXAMINATION by Mr. Williams he testified as follows:

My understanding was that the one hundred dollars to pay for the railroad stock was to be turned over to the railroad. My purchases were both purchases and trades; principally purchases.

(Witness excused.)

G. W. BUSH, called and sworn as a witness on behalf of the defendants, on direct examination by Mr. Williams, testified as follows:

My name is G. W. Bush, and I live in Spokane

and am engaged in the real estate business. I am acquainted with both defendants. From December, 1910, until March, 1911, I acted as salesman for these stocks in the vicinity of Waitsburg and Dayton. I was present at times when Mr. Belden was making sales. At none of these times did I ever hear Mr. Belden make representations that coal had been found in place on the Empire or the Michel or that the right of way had been entirely secured for the railroad. I know of some sales that were made in the way of trades and in such cases it was represented as personal stock. I know of no exception to that rule. I do not recall of any representations having been made in regard to the railroad stock in my hearing. I have been over the property I think twice, once with prospective purchasers. At that time the property was fully shown and I do not know of any representations having been made at that time about the right of way having been entirely secured.

On CROSS EXAMINATION by Mr. Garrecht he testified as follows:

I was engaged in selling treasury stock and in making these personal stock trades when they came up.

(Witness excused.)

H. I. HODGE, recalled on direct examination by Mr. Williams testified as follows:

MR. WILLIAMS.—I think that you failed to

give me the figures the other day about the Michel, the amount of this stock.

MR. GARRECHT.—The stock which was resold, I believe?

MR. WILLIAMS.—Yes, how much of it was the original promoters?

MR. GARRECHT.—I have that; that was given by Mr. House and how much was purchased afterwards by the International Development Company?

A.—The promoters and bonus stock issue was 425,000 shares \$1500.00, includes 97,430 shares \$14,195.97.

MR. WILLIAMS: I don't care about the amounts.

A.—In shares it is 97,430.

Q.—Or a total of how much? A.—A total of 522,430.

Q.—And I have forgotten what Mr. House's figures are if you have got it there?

A.—His figures and sales were 993,532 shares.

CROSS EXAMINATION by Mr. Garrecht:

Q.—Where did you get your figures, Mr. Hodge?

A.—From Mr. House, Mr. House's figures.

Q.—Well, now, how do you figure that 425,000 shares were personal when he gave it as 953,000?

A.—They were personal—

THE COURT.—The witness has distinguished between re-sales and sales of original stock, as I understand it.

A.—This stock was issued at a nominal price to this syndicate or promoters, 425,000 shares.

Q.—You are talking about what company?

A.—Talking about the Michel.

Q.—Do you know whether there were any promoters in the Michel?

THE COURT.—They were the persons to whom the stock issued on its incorporation, as shown by the minute book.

MR. GARRECHT.—Q. Do you know that?

A.—Why, absolutely no. These were issued at a nominal amount.

REDIRECT EXAMINATION by Mr. Williams:

Q.—Mr. Hodge, did you look at the minute book as a verification. A.—Verify this stuff?

(Witness excused.)

J. H. HEMPHILL, recalled on behalf of the defendants, on direct examination by Mr. Williams, testified as follows:

I attended the meeting of these different coal companies from time to time even after I ceased to be connected with the International Development

Company. I know I attended some of the Crown meetings. I do not think in any of these meetings that I attended I ever saw Mr. Belden or Mr. Wayland do anything in the way of controlling these meetings except as usual with stockholders. While I was serving on the board and after I had ceased to be with the International Development Company I did not have any agreement or understanding to vote or act as Belden and Wayland wanted me to. At the meeting in January, 1910, there was some disagreement between us and I tried to get control of the property at that time and had done something for the purpose of forming a combination for that purpose. I think I was a trustee in the Michel the first year, but not after I had ceased to be with the International Development Company.

On CROSS-EXAMINATION by Mr. Garrecht, he testified as follows:

I am forty-three years of age. At the meeting held in January, 1910, I think Mr. Wayland attempted to vote one hundred and fifty thousand shares of stock but we protested, and Mr. Graves was called in to decide whether it could be voted or not, and I think he said it couldn't be voted. I don't think it was. I was on the credentials committee which reported against the stock being voted.

On REDIRECT EXAMINATION by Mr. Williams he testified as follows:

In the early days of these properties both Mr. Belden and Mr. Wayland were up there a great deal.

(Witness excused.)

RETHA COVINGTON, recalled on direct examination by Mr. Williams testified as follows:

In regard to the Lloyd transaction of twenty-five dollars, I do not know how it got into the International Development Company account except that it is an error on my part. We were issuing a great deal of stock at that time and it must have been an error because all others were issued from the treasury of the Michel. It was not an intentional mistake and no one told me to make the error. While I have been there in the office I have been familiar with the business that has been done and the course of conduct in the office, and have heard a great many conversations between the sales department and prospective purchasers. I never at any time knew of Mr. Belden or Mr. Wayland representing that coal had been found in place on either the Michel or the Empire. I have heard them talking about it, however, with prospective purchasers in the office in regard to the coal and I have heard Mr. Belden make statements to prospectors that he thought there was coal on this property and that he was sure the same veins of coal underlaid the Empire that were in the Crown. The different meetings of these various companies were generally held in some of the offices that we occupied

and I was nearly always present but I never heard any representations made other than along the same lines I have just told of.

I saw this statement signed by Mr. Woods immediately after it was signed there in the office but I was not in the room when it was signed.

Q.—While you were there, Miss Covington, would the stockholders at any time come to you for information?

A.—Yes, sir, a good many times.

Q.—And what was your attitude with reference to trying to give the fact correctly?

A.—I certainly tried to give the facts just as I knew them and thought they were; tried to make the statements whatever I made perfectly sincere.

On CROSS EXAMINATION by Mr. Garrecht she testified as follows:

I am a stockholder and officer of the International Development Company and am the only other officer and stockholder besides the defendants.

(Witness excused.)

MR. WILLIAMS.—The defendants rest.

WHEREUPON the following testimony was offered in rebuttal.

LUCY SHEPHERD, recalled as a witness for the Government, on direct examination by Mr. Garrecht, testified as follows:

I have been previously sworn. I was at one time bookkeeper for the International Development Company.

Q.—While you were in their office were there any personal stock sales that the International Development Company made from their personal certificates which were sold for cash or notes?

MR. WILLIAMS.—I object to that as not rebuttal.

THE COURT.—She may answer the question. I don't know what it is leading up to.

(Defendants except and exception allowed.)

A.—Yes.

Q.—I now show you Plaintiff's Exhibit "24," cash book of the International Development Company at page 42 and call your attention particularly to the entry of March 19, 1910, and ask you if that is in your handwriting?

A.—Yes, sir, that is in my handwriting.

Q.—What is the entry, Mrs. Shepherd; just read it?

A.—125 shares Michel stock twenty cents, amounting to \$25.00 in the name of Lloyd.

Q.—Had you any instructions to make that entry, Mrs. Shepherd?

MR. WILLIAMS.—I object to that as not rebuttal, and incompetent, irrelevant and immaterial.

THE COURT.—Objection overruled.

(Defendants except and exception allowed.)

A.—I never made any entries regarding the stock sales unless I had instructions.

Q.—Whom did you have these instructions from?

A.—They came from either Mr. Belden or Mr. Wayland. Mr. Wayland was supposed to be in charge of the books.

On CROSS EXAMINATION she testified as follows:

(Witness excused.)

B. L. THORN, called in rebuttal, testified as follows:

DIRECT EXAMINATION by Mr. Garrecht:

Q.—What is your name, please? A.—B. L. Thorn.

Q.—Where do you live? A.—Hosmer, British Columbia.

Q.—What is your business? A.—I am a mining engineer.

Q.—Were you ever with the Canadian Pacific or the Pacific Coal Mines Companies? A.—I have been with the Canadian Pacific Coal Mining interests under various names and designations since 1913.

Q.—Are you acquainted with Mr. Belden, the gentleman sitting at the end of the table? A.—I

believe that I met Mr. Belden in 1907 for a very short time.

Q.—Did you have any business dealings with Mr. Belden relative to the right of way of a railroad?

A.—I had a conversation with him.

Q.—What year was that? A.—I believe it was 1907, to the best of my recollection.

Q.—At that time did you have any conversation with him relative to the coal mine properties known as the Empire and Michel?

MR. MILLER.—I object to that as not rebuttal.

THE COURT.—Answer yes or no.

A.—No.

MR. GARRECHT.—Q. Did you ever tell Mr. Belden that in your opinion the coal veins from the Crown mountain extended over to the Empire and the coal veins from the McInnis property extended over to the Michel?

A.—Did not.

Q.—Did you ever tell him that you believed the Empire property or the Michel property to be valuable coal property? A.—I did not.

MR. GARRECHT.—Take the witness.

MR. WILLIAMS.—That is all.

(Witness excused.)

WHEREUPON the taking of testimony was closed.

MR. MILLER.—We desire to renew the motion which we made at the close of the Government's case in chief.

THE COURT.—That will not consume any time. The motion is denied.

MR. MILLER.—If your honor will permit the record to show the motion which we made is renewed.

THE COURT.—Yes.

(Defendants except and exception allowed.)

WHEREUPON an adjournment was taken until May 2nd, 1914, and thereupon the case was argued by the respective counsel and thereafter the court instructed the jury.

*In the District Court of the United States for the
Eastern District of Washington,
Northern Division.
No. 1881.*

UNITED STATES OF AMERICA,

Plaintiff,

vs.

RUSSELL G. BELDEN and
A. EUGENE WAYLAND,

Defendants.

Charge to Jury.

GENTLEMEN OF THE JURY:

The indictment in this case was returned under Section 215 of the Federal Criminal Code, approved

March 4, 1909, which so far as material to our present inquiry reads as follows:

"Whoever having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises * * * shall for the purpose of executing said scheme or artifice or attempting so to do, place, or cause to be placed, any letter, * * * whether addressed to any person residing within or outside of the United States in any postoffice, * * * to be sent or delivered by the postoffice establishment of the United States," shall be fined or imprisoned, etc.

Here Court read indictment.

The indictment then further charges in three separate counts that for the purpose of executing such scheme or artifice the defendants deposited for mailing and delivery in the United States postoffice three certain letters, copies of which are set forth in the several counts.

Under this statute two matters of fact must be charged in the indictment and established by the evidence at the trial. First, that the defendants devised a scheme or artifice to defraud; and, second, that in carrying out such scheme or artifice to defraud the defendants deposited or caused to be deposited a letter or letters in the postoffice establishment of the United States.

I will at this time define to you the different terms used in the statute and in the indictment.

“To devise” means to form a scheme; to lay a plan; to contrive. A “Scheme” is a design or plan formed to accomplish some purpose. An “artifice” is an ingenious contrivance or device of some kind, and the term as used in this statute is equivalent to “trick” or “fraud.” To “defraud” implies or includes all acts, omissions, and concealments which involve a breach of legal or equitable duty, trust or confidence generally imposed, and are injurious to another, or by which an undue and unconscionable advantage is taken of another. It means to wrongfully deprive one of something he already has and not of mere expectations excited by promise of future gain. “Fraudulent pretenses,” “representations” or “promises” mean such fraudulent representations of an existing or past fact by one who knows it not to be true as are adapted to induce the person to whom they are made to part with something of value. False pretenses or representations may relate to quality, quantity, nature or other incidents or attributes of articles offered for sale whereby purchasers relying on such false representations are defrauded. While in negotiations for the sale of property statements may be mere expressions of opinion by which the seller seeks to enhance the price of the property offered for sale, and justifiable, yet when they are made and intended as the assertion of a fact material to the negotiations as a basis on which sales are to be made, if the representations be false, and known to the seller to be so, the seller is guilty of the offense

if he thereby induces the buyer to part with his money or property.

The letters must be deposited in the postoffice establishment for the purpose of executing the scheme or artifice to defraud or attempting to do so, but it is not necessary that the letter or letters mailed be of a nature or character to be effective in carrying out the fraudulent scheme or device. It is enough if, having devised a scheme to defraud, the defendants, with a view of executing it, deposited in the postoffice letters which they thought might assist in carrying the scheme into effect, although in the judgment of the jury they may be wholly ineffective for that purpose.

The devising of a scheme or artifice to defraud is an act of the mind; it of necessity involves an intention to defraud. The devising of such a scheme and the evidence of such an intent may be shown by the acts and declarations of the parties concerned and by the attending circumstances as well as by direct evidence. Whether such an intent has been proved in this case is a question of fact for your determination. As observed by the Supreme Court of the United States: Experience shows that positive proof of fraudulent acts is not generally to be expected and for that reason among others the law permits a resort to circumstances as a means of ascertaining the truth. And in such cases great latitude is allowed by law to the acceptance of indirect or circumstantial evidence, the said of which is constantly required

not merely for the purpose of remedying the want of direct evidence but also to supply protection against imposition. Whenever the necessity arises for a resort to circumstantial evidence, either from the nature of the inquiry or the failure of direct proof, objections to testimony on the ground of irrelevancy are not favored for the reason that the force and effect of circumstantial facts usually and almost necessarily depends upon their connection with each other. Circumstances altogether inconclusive if separately considered may, by their number and joint operation, established or corroborated by minor coincidences, be sufficient to constitute conclusive proof; and where fraud in the purchase or sale of property is in issue evidence of frauds of like character committed by the same parties, at or near the same time, is admissible. Its admissibility is placed on the ground that where transactions of a similar character, executed by the same parties, are closely connected in point of time the inference is reasonable that they proceed from the same motive. The case of fraud as here stated, is among the few exceptions to the general rule that other offenses of the accused are not relevant to establish the main charge. In order to constitute a scheme and artifice to defraud it is not necessary to show that the defendants intended to defraud every person with whom they might have dealings, or that their entire business was a fraud; neither is it necessary to show or prove that the scheme or artifice was developed all at one

time. It may have been formed gradually, but in order to constitute the scheme or artifice mentioned in the statute it must all have been formed prior to and be in existence at the time of the commission by the defendants of the overt act of depositing the letter in the postoffice.

But while circumstantial evidence is admissible and competent to establish the fraudulent intent it is equally admissible and competent for the purpose of establishing good faith and honesty of purpose of the non-existence of a fraudulent intent, and it is for you to say in this case from all the facts and circumstances whether the defendants devised a scheme and artifice for the purpose of defrauding those with whom they might deal, as charged in the indictment. The defendants are not on trial for evolving or devising an improvident or impractical scheme, even though you should find their plan to be such, nor are they on trial for mere errors of judgment. They are on trial for a criminal offense, and an essential element of that offense is an evil or criminal intent which it is incumbent on the government to prove to your satisfaction and beyond a reasonable doubt. And where circumstantial evidence is relied on the circumstances themselves must be proved to the satisfaction of the jury and beyond all reasonable doubt; and when so proved they must not only be consistent with the main fact in issue, namely, the guilt of the defendants, but they must be inconsistent with every other rational hypothesis.

Testimony has been offered here tending to show acts committed or declarations made by each of the defendants, and I will now instruct you as to the circumstances under which acts committed or declarations made by one defendant may be used against the other. Ordinarily a person is only amenable to a criminal law for his own acts and his own conduct and not for the acts or conduct of others. There are, however, two well recognized exceptions to this rule. One is where two or more persons form a conspiracy to commit a crime and the other is where one person aids, abets, counsels, commands, induces or procures the commission of a crime by another. A conspiracy is generally defined as an agreement or combination between two or more persons to commit some unlawful act or to commit some lawful act by unlawful means. Such a combination or agreement is usually proved by circumstantial evidence. All the text books agree that the evidence in proof of a conspiracy may be and from the nature of the case generally must be circumstantial. All concerted action to violate the law is secret and is ordinarily shown by separate independent acts tending to accomplish the common design. The common design is the essence of the charge and to prove it it is not necessary to prove that the parties came together and actually agreed in terms on that design and to pursue it by common means.

The jury will be justified in inferring the existence

of a conspiracy when the government satisfies them beyond a reasonable doubt by the testimony of credible witnesses that the two parties charged aimed by their acts to accomplish some unlawful purpose or object—one performing one part and another another part of the same so as to complete it although they may never come together to concert the means or to give effect to the design; nor is it necessary that the conspiracy should originate with the persons charged. Every one acting in a conspiracy at any stage of the proceeding with knowledge of its existence is regarded in law as a party to all acts done by any of the other parties before or after in furtherance of the common design. But as I have already said, gentlemen of the jury, in relation to fraud, whether the conspiracy is established by direct or by circumstantial evidence, it must be established to your satisfaction and beyond a reasonable doubt before you can find the defendants guilty on that basis or theory. If you find from the testimony beyond a reasonable doubt that the defendants conspired together to commit the offense charged in the indictment then the acts of each defendant in furtherance of the common design are in contemplation the acts of both and binding on both.— And if you find from the testimony beyond a reasonable doubt that either defendant aided, abetted, counseled, commanded, induced or procured the commission of the crime charged in the indictment by the other, then both defendants are equally guilty. But unless you

find beyond a reasonable doubt that there was a conspiracy or that one of the defendants aided, abetted, counseled, commanded, induced or procured the commission of the crime by the other, each defendant is criminally responsible for his own acts and his own conduct if guilty at all.

From what I have said, gentlemen, you will observe that these defendants are not charged simply with perpetrating or attempting to perpetrate a fraud upon an individual or any number of individuals because over such frauds the federal government and this court have no jurisdiction. It is only where a scheme or artifice to defraud has been devised and the United States mails are used for the purpose of executing that scheme or artifice that the crime comes within the federal statute, and both of these facts must co-exist and be found by the jury beyond a reasonable doubt before you can find a verdict of guilty.

The foregoing instructions I trust will be sufficient to guide you in your deliberations. The defendants have interposed a plea of not guilty and this plea places in issue every material averment of the indictment and casts upon the government the burden of proving every such averment to your satisfaction and beyond a reasonable doubt. In this connection I charge you that a reasonable doubt is such a doubt as well cause a reasonable, prudent and considerate man to hesitate or waver in the graver and more important concerns of human life before acting upon

the truth of the matters charged or alleged. This doubt may arise from the evidence or from the lack of evidence. On the one hand you will not be swayed by doubts which are purely imaginary and capricious and on the other hand you must not yield to doubts which are real and substantial. If from a full and fair consideration of all the testimony you can say upon your oaths as jurors that you have an abiding conviction to a moral certainty of the truth of the charge, then you have no reasonable doubt. But if you have no such moral conviction—if you have a doubt for which a reason can be given—you must give the defendants the benefit of that doubt and find them not guilty.

I further instruct you that the defendants are entitled to the opinion and judgment of each individual juror, and so long as any member of the jury entertains a reasonable doubt it is his duty to vote for an acquittal. I do not mean by this that you should be arbitrary or unyielding because you must compromise your differences as best you can and so far as you can consistent with your oaths. I further charge you that every person accused of a public offense is presumed in law to be innocent of the crime charged until his guilt is established to the satisfaction of the jury and beyond all reasonable doubt. This presumption of innocence is not a mere fiction which you may disregard at pleasure. It is a substantial part of the law of the land; it accompanies these defendants throughout the trial and abides with them

until its last vestige is destroyed and until their guilt is established by the evidence to your satisfaction and beyond all reasonable doubt. You, gentlemen of the jury, are the exclusive judges of the facts and of the credibility of the witnesses, but the law you will accept from the court. Before reaching a verdict you will carefully consider and compare all the testimony. You will observe the demeanor of the witnesses upon the stand; their interest in the result of your verdict if any such interest is shown; their knowledge of the facts in relation to which they have testified; their opportunity for hearing, seeing or knowing those facts; the probability of the truth of their testimony; their candor or lack of candor, their bias or prejudice, or the absence of either of these qualities, and all the facts and circumstances given in evidence and surrounding the witnesses at the trial. And if you find that any witness has wilfully testified falsely to a material fact you are at liberty to disregard the testimony of that witness entirely, except in so far as he or she may be corroborated by other credible testimony or by other known facts in the case. I further instruct you that no proof has been offered as to the mailing of the letter set forth in the third count of the indictment and as to that count I direct a verdict of not guilty. As to the other two counts it will be competent for you to find either or both of the defendants guilty or not guilty and proper forms of verdict will be submitted to you. I will say in conclusion gentlemen, that the postoffice es-

tablishment of the United States is a public agency created and maintained by the government at public expense for the convenience of all the people. It is important that this agency should not be used for the purpose of promoting fraud and congress has passed laws prohibiting such misuse of the mails. It is the duty of courts and juries to enforce these laws whenever and wherever violated and if you are satisfied from the testimony in this case beyond a reasonable doubt that these defendants have violated the law in manner and form as charged in the indictment you will so find by your verdict. On the other hand, gentlemen, if you entertain a reasonable doubt as to their guilt your duty to acquit is equally plain and mandatory. The government insists upon obedience to its laws but it demands no victims. It asks equal and exact justice at your hands and nothing more; justice for itself and justice for the citizens accused of violating its laws.

You may now retire and consider of your verdict.

(Endorsements): Charge to Jury. Filed in the U. S. District Court, Eastern Dist. of Washington, May 2, 1914. Wm. H. Hare, Clerk. Frank C. Nash, Deputy.

DEFENDANTS' REQUESTED INSTRUCTIONS.

No. 1.

You are instructed to find the defendants and each of them not guilty upon the first count in the indictment. REFUSED.

No. 2.

You are instructed to find the defendants and each of them not guilty upon the second count in the indictment.

REFUSED.

No. 3.

You are instructed to find the defendant, R. G. Belden, not guilty upon the first count in the indictment.

REFUSED.

No. 4.

You are instructed to find the defendant, R. G. Belden, not guilty upon the second count in the indictment.

REFUSED.

No. 5.

You are instructed to find the defendant A. E. Wayland, not guilty on the first count in the indictment.

REFUSED.

No. 6.

You are instructed to find the defendant, A. E. Wayland, not guilty on the second count in the indictment.

REFUSED.

No. 8.

I instruct you that before you can find the defendants or either of them guilty upon either of

the counts in the indictment you must find that prior to the overt acts charged in the indictment, to-wit: the sending or causing to be sent the letters set out in the first and second counts thereof, (if you find they, or either of them, did mail or cause the same to be mailed) that upon sometime prior to said date the defendants conspired and confederated together to commit the wrongful and unlawful acts set forth in the indictment herein, and unless you find, or believe, beyond a reasonable doubt, that said conspiracy was entered into for the purpose of committing the unlawful acts set forth in the indictment, then you will find the defendants and each of them not guilty.

REFUSED.

No. 10.

You are further instructed that the case upon the part of the Government in so far as relates to whether there are, or are not, commercial deposits of coal on the Empire and Michel properties depends upon the opinion of its expert, and in this connection I instruct you that the defendants cannot be convicted upon the opinion of an expert as to whether there is or is not coal upon said properties and your verdict will not be guilty upon both counts in the indictment.

REFUSED.

No. 11.

You are further instructed that unless you find, beyond a reasonable doubt that both the Michel and

Empire properties are worthless as far as containing commercial veins of coal is concerned, your verdict will be not guilty upon both counts in the indictment.

REFUSED.

No. 12.

You are further instructed that before you can find the defendants guilty you must believe that they willfully and unlawfully entered into the conspiracy set out in the indictment for the purpose of defrauding the persons to whom the said letters were sent and others, and that it was a part of the said conspiracy to use the mails in the executing of said fraudulent scheme and device, or having entered into said unlawful and fraudulent scheme and device used the mails in executing the same. These elements of the offense, as well as all others, must be established to your satisfaction and beyond a reasonable doubt.

REFUSED.

No. 13.

You are instructed that the government has failed to introduce any testimony to the effect that the defendants wrote, or caused said letters set out in the first and second counts of the indictment, to be written, or that they mailed, or caused the same to be mailed, and therefore your verdict must be not guilty as to both of said defendants upon both counts in the indictment.

REFUSED.

No. 15.

You are further instructed that no evidence has been offered to show that the letters set out in the first and second counts were to be given any other or different interpretation than they purport to have upon their face and in considering them you will accord them the interpretation or meaning to which they are entitled by a reading thereof.

REFUSED.

No. 17.

You are instructed that the letter set out in the first count of the indictment if you find the same was deposited by the defendants or caused to be deposited in the United States mail was for the purpose only of effecting a sale of treasury stock of the companies mentioned in the letter, then as to that count you will disregard all evidence introduced in this case with reference to any representations it is claimed by the Government were made to any purchasers or prospective purchasers as to sales made as to whether the same was treasury or personal stock and any and all evidence that may have been introduced with reference to the purpose for which the proceeds realized from railroad shares of stock were to be used.

REFUSED.

No. 18.

You are instructed that the letter set out in the first count has not been explained in any manner and you can give it only the construction which it

bears upon its face and that is, that it was, if so deposited in the post office, for the purpose of executing a sale of treasury stock of the companies mentioned to John Neiderer and was not for the purpose of executing any sale of the defendants' personal stock or for the purpose of making any sale of railroad stock.

REFUSED.

No. 19.

You are instructed as to the second count that the letter therein set forth has not in an manner been explained and if you find that the same was either placed or caused to be placed by the defendants in the United States post office, you can only give the said letter the construction which it bears on its face. That construction is that it was a report of the action of a stockholders' meeting of the Empire Coal & Coke Company. There has been no evidence introduced to the effect that any representation contained in said letter was in any respect false and I charge you that there was nothing improper in defendants depositing it in the mail, if you find that they did so, nor does it establish on its face any intention or purpose, of any improper control or manipulation of the said Empire Coal & Coke Company.

REFUSED.

No. 20.

You are further instructed with reference to the said second count that there is no evidence showing

that the same was placed in the United States Post Office, if you find it was so placed by the defendants or caused to be so placed, for the purpose of executing any sales of the defendants' personal stock under any representation that any was treasury stock, nor for the purpose of executing any sale of railroad stock and in considering said second count, you will disregard all evidence introduced bearing upon the question of the sales of any personal stock under any representation that it was treasury and any evidence relating to the sale of railroad stock.

REFUSED.

No. 23.

If you find from the evidence that the defendants did not misrepresent the facts as to the presence or absence of coal on the property referred to in the indictment, you must find the defendants not guilty since it is on this allegation that the indictment is founded, as to both counts.

REFUSED.

(Endorsements): Instructions Requested by Defendants. Filed in the U. S. District Court, Eastern District of Washington, May 4, 1914. Wm. H. Hare, Clerk. Frank C. Nash, Deputy.

*In the District Court of the United States, for the
Eastern District of Washington,
Northern Division.*

No. 1881.

UNITED STATES OF AMERICA,

Plaintiff.

vs.

RUSSELL G. BELDEN and
A. EUGENE WAYLAND,

Defendants.

Exceptions to Instructions of Court to Jury.

The defendants jointly and severally, after the instructions were given the jury and before they retired to consider their verdict, excepted to the instructions given by the court and the refusal to instruct as follows:

1. Except to that part of the instructions in which the jury are told that there are only two elements involved in the offense charged, one the scheme and devise to defraud, and the other the use of the mails for the purpose of executing fraud, for the reason that in this case it eliminates a necessary element under the character of evidence introduced by the government, to-wit: The use of the mails or the intent to use the mails, since a part of the evidence introduced related to a time preceding the last amendment to the Act under which the defendants were prosecuted.

2. Except to the instructions of the court wherein it is stated "if the representations be false and known to the seller to be so, the seller is guilty of the offense if he thereby induced the buyer to part with his money or property," for the reason that it excludes the necessary element of the use of the mails.

3. Except to the instruction following in which the jury were told that where fraud in the purchase or sale of property is in issue evidence of frauds of like character committed by the same parties, at or near the same time is admissible, for the reason that the court at no point instructed the jury as to what were the material elements of fraud to be established by the government in order to establish the offense charged in the indictment, of which it is alleged the letters were in execution, and at no place in the instruction was the jury advised of what the character of evidence was that had been introduced for the purpose of assisting the jury in determining whether fraud was or was not committed, and for the further reason that such evidence is not admissible in a case of this character.

4. Except to the instructions following in which it is said, "Its admissibility is placed on the ground that where transactions of a similar character, executed by the same parties, are closely connected in point of time the inference is reasonable that they proceed from the same motive," for the same reason stated in the preceding exception, that the jury at no place were told what the material elements of

fraud or scheme to defraud were with which the letters set out in the indictment were used, or the mails were used, nor were the jury instructed as to what evidence or what the character of evidence was which had been introduced in this case for the purpose of establishing the intent or scheme or which was material to be proven by the government in this case.

5. Except to the portion of the charge following, to-wit: "The case of fraud as herein stated, is among the few exceptions to the general rule that other offenses of the accused are not relevant to establish the main charge," for the same reason as stated in the two preceding exceptions, and particularly that no where were the jury instructed as to the main charge on which the government was relying or which the government had to establish as a scheme or artifice to defraud.

6. Except to that part of the charge as follows: "Testimony has been offered here tending to show acts committed or declarations made by each of the defendants and I will now instruct you as to the circumstances under which acts committed or declarations made by one defendant may be used against the other. Ordinarily a person is only amenable to the criminal law for his own acts and his own conduct and not for the acts or conduct of others. There are, however, two well recognized exceptions to this rule; one is where two or more persons form a conspiracy to commit a crime, and the other is

where one party aids, abets, counsels, commands, induces or procures the commission of a crime by another," for the reason that said charge was not within any of the issues in the case; that there was no conspiracy charged in the indictment, and for the further reason that there was no evidence at all in the record of any overt act of conspiracy, particularly no testimony of any overt act so far as the defendant Wayland was concerned, and in order for there to be conspiracy there would have to be some joint act of two or more parties.

7. Except to the portion of the charge following, to-wit: "A conspiracy is generally defined as a crime or combination between two or more persons to commit some unlawful act or to commit some lawful act by unlawful means," for the reason that it was not an issue in the case under the indictment, and further that there was no proof of conspiracy and particularly no proof of any overt act so far as the defendant Wayland is concerned.

8. Except to that portion of the charge in which the jury were told "if you find from the testimony beyond a reasonable doubt that the defendants conspired together to commit the offense charged in the indictment, then the acts of each defendant in furtherance of the common design are in contemplation the acts of both and binding on both," for the reason that the question of conspiracy was not an issue in the case, there was no evidence of any overt act of conspiracy, and particularly no evidence of any act

on the part of the defendant Wayland or of any one joining with the defendant Belden, if there was any evidence so far as he was concerned.

9. Except to that portion of the charge, "and if you find from the testimony beyond a reasonable doubt that either defendant aided, abetted, counseled, commanded, induced or procured the commission of the crime charged in the indictment by the other, then both defendants are equally guilty," for the same reasons as given in the preceding exception; for the reason that there is no charge in the indictment of conspiracy, no evidence of conspiracy and particularly no evidence of any overt act by either defendant on any question of conspiracy, and particularly as to the defendant Wayland, and for the further reason that there is no issue in this case as to either of the defendants having aided, abetted, counseled, commanded, induced or procured the commission of any such crime, nor was there any evidence of such fact.

10. Except to that part of the instruction following, "but unless you find beyond a reasonable doubt that there was a conspiracy and that one of the defendants aided, abetted, counseled, commanded, induced or procured the commission of the crime by the other each defendant is criminally responsible for his own acts and his own conduct if guilty at all," for the same reasons as given in the preceding exception and for the further reason that the government could not rely both upon a question of con-

spiracy and individual acts of each defendant and it would constitute a question of duplicity in pleading.

11. Except to the instruction to the jury wherein the court explained that the post office establishment is a public agency created and maintained by the government at public expense and it is important that this agency should not be used for the purpose of promoting fraud, and Congress has passed laws prohibiting such mis-use of the mails, and stated that it was the duty of courts and juries to enforce these laws wherever violated and if you are satisfied, etc., for the reason that the question of intent and purpose of the statute was not an element in the case or material and the purpose and intent as stated by the court was evidenced by no language of the statute itself.

12. Defendants further except to the failure of the court to instruct the jury or define the jury's rights with reference to considering the acts or declarations of one of the defendants so far as it affected the other in case the jury failed to find a conspiracy.

13. Except to the refusal of the court to give defendants' requested instruction No. 1.

14. Except to the refusal of the court to give defendants' requested instruction No. 2.

15. Except to the refusal of the court to give defendants' requested instruction No. 3.

16. Except to the refusal of the court to give defendants' requested instruction No. 4.

17. Except to the refusal of the court to give defendants' requested instruction No. 5.

18. Except to the refusal of the court to give defendants' requested instruction No. 6.

19. Except to the refusal of the court to give defendants' requested instruction No. 7.

20. Except to the refusal of the court to give defendants' requested instruction No. 8.

21. Except to the refusal of the court to give defendants' requested instruction No. 9.

22. Except to the refusal of the court to give defendants' requested instruction No. 10.

23. Except to the refusal of the court to give defendants' requested instruction No. 11.

24. Except to the refusal of the court to give defendants' requested instruction No. 12.

25. Except to the refusal of the court to give defendants' requested instruction No. 13.

26. Except to the refusal of the court to give defendants' requested instruction No. 14.

27. Except to the refusal of the court to give defendants' requested instruction No. 15.

28. Except to the refusal of the court to give defendants' requested instruction No. 16.

29. Except to the refusal of the court to give defendants' requested instruction No. 17.

30. Except to the refusal of the court to give defendants' requested instruction No. 18.

31. Except to the refusal of the court to give defendants' requested instruction No. 19.

32. Except to the refusal of the court to give defendants' requested instruction No. 20.

32. Except to the refusal of the court to give defendants' requested instruction No. 21.

34. Except to the refusal of the court to give defendants' requested instruction No. 22.

35. Except to the refusal of the court to give defendants' requested instruction No. 23.

DANSON, WILLIAMS & DANSON,
ROBERTSON & MILLER,

Attorneys for Defendants.

(Endorsements): Exceptions. Filed in the U. S. District Court, Eastern Dist. of Washington, May 2, 1914. Wm. H. Hare, Clerk. Frank C. Nash, Deputy.

EXHIBITS.

Plaintiff's Exhibit No. "1."

ARTICLES OF INCORPORATION OF R. G. BELDEN COMPANY.

Incorporators: R. G. Belden, A. E. Wayland, & Jas. A. Williams.

Objects: General Realestate and promoting.

Executed August 13th, 1905.

Plaintiff's Exhibit No. "2."

Page 10, Minute Book, Michel Coal Mines Ltd.,
as follows:

"Spokane, Wash., Nov. 25, 1905.

Trustees of the Michel Coal Mines, Limited,
Spokane, Washington.

Gentlemen:

The undersigned respectfully propose to sell to your Company for the sum of \$1,500,000.00 two certain coal locations in East Kootenai District, British Columbia; the same now being located in the name of J. T. Penn and C. L. Butterfield. We are of the opinion that these coal locations are amply worth the sum of \$1,500,000.00.

If this offer is accepted you may apply the purchase price on said coal locations in payment of our unpaid subscription to your capital stock.

Respectfully,

INTERNATIONAL DEVELOPMENT CO.

By R. G. Belden, Pres.

Attest: J. H. Hemphill, Secy.
J. T. Penn,
R. G. Belden,
J. H. Hemphill."

Plaintiff's Exhibit No. "3."

Articles of Incorporation of the International Development Company.

Incorporators: Russel G. Belden, A. Eugene Wayland, and John H. Hemphill.

Objects: Own, buy, sell, etc., coal, oil, gas and other mineral lands, in the United States, British Columbia, and foreign countries.

Capital Stock: \$30,000.00, stock \$1.00 per share.

Executed: April 27, 1905.

Plaintiff's Exhibit No. "4."

Michel Coal Mines, Ltd.

Incorporators: J. T. Penn, J. H. Hemphill, and R. G. Belden.

Objects: Own, lease, buy, sell, bond, promote, etc., coal and other mineral lands in the United States, British Columbia, and foreign countries.

Capital Stock: \$1,500,000.00. Stock, \$1.00 per share.

Executed: November 18, 1905.

Plaintiff's Exhibit Nos. "5" & "6."

British Columbia Mining licenses of C. L. Butterfield, and J. T. Penn.

Plaintiff's Exhibit No. "7."

Partnership Agreement between R. G. Belden, S. W. O'Brien, and J. H. Hemphill. Parties agree

to form a co-partnership, styled "Inland Surety Company," for the purpose of selling Treasury Stock of Michel Coal Mines Ltd., on commission and other business of like nature, and continue for three years. They to receive commission of 20% for selling Treasury Stock of said Michel Company.

By mutual consent the foregoing agreement dissolved March 6th, 1906.

Plaintiff's Exhibit Nos. "8," & "9."

No. "8." Page 15, Minute Book, Michel Company, being record of special meeting of the Board of Trustees, December 4, 1905.

Present: Belden, Penn and Hemphill.

Object: Considering communication from Inland Surety Company, and Michel Company relative failure to authorize Inland Surety Company to sell other stock of the Michel Company than Treasury Stock, and authorizing agreement in plaintiff's exhibit "9."

No. "9." Agreement between Michel Company and Inland Surety Company authorizing latter to sell 500,000 shares of Michel Company's Treasury Stock, on a basis of 20% commission, and 25,000 shares as a bonus. 100,000 shares to be sold at 05c per share. Signed: Hemphill, Penn and O'Brien.

Plaintiff's Exhibit No. "10."

For identification.

Plaintiff's Exhibit No. "11."

Page 11, Minute Book, Michel Company. Letter from International Development, J. T. Penn, R. G. Belden and others, to the Trustees Michel Company, directing the division of the capital stock of the company other than Treasury, of which O'Brien was to receive 20,000 shares, Hemphill 100,000 and R. G. Belden 100,000.

Plaintiff's Exhibit No. "12."

Page 20, Minute Book, Michel Company. Being meeting of the Board of Trustees of the Michel Company, May 19, 1906.

Present: J. T. Penn, J. H. Hemphill, R. G. Belden, C. L. Butterfield, and William Hart.

Object: To purchase 1280 acres of land adjoining present holdings of the company, for \$2500.00, and 50,000 shares of stock. R. G. Belden recommending purchase in letter.

Plaintiff's Exhibit No. "13."

Page 11, same as Exhibit "11."

Plaintiff's Exhibit No. "14."

Mining License, E. H. LeFranz.

Plaintiff's Exhibit No. "15."

Page 37, Michel Company's Minute Book. Being report from International Company to Michel Company, January 20, 1908, of receipts and disbursements for the year 1907.

Plaintiff's Exhibit No. "16."

EXTRACTS FROM EX. 16.

MINUTES OF THE ANNUAL MEETING OF
THE BOARD OF TRUSTEES OF THE IN-
TERNATIONAL DEVELOPMENT COM-
PANY. Jan. 2nd, 1911.

Immediately succeeding the Annual Stockholders' meeting, the meeting of the Board of Trustees of the International Development Company was held at the principal office of the Company, 624 Peyton Bldg., Jan. 2nd, 1911.

Present: R. G. Belden and A. E. Wayland, being a quorum for the transaction of business as stipulated in the By-Laws of this Company.

Upon motion duly made and seconded, the following officers were unanimously elected:

R. G. Belden, President.

Jas. A. Williams, Vice-President.

A. E. Wayland, Sec'y-Treas.

It was thereupon moved by Mr. Wayland that a dividend of \$70,000.00 be declared from the undivided profits of the Company, such dividends to be paid in promissory notes due the Company, and by 100,000 shares of Crown stock at 50c per share. Motion was seconded and unanimously carried, and the Secretary was ordered to disburse said dividend to stockholders of record in their pro rata amounts.

There being no further business to come before the meeting, it was adjourned.

A. E. WAYLAND,
Sec'y-Treas.

Approved:

R. G. Belden,
President.

EXTRACTS.

MINUTES OF SPECIAL MEETING OF STOCKHOLDERS OF THE INTERNA- TIONAL DEVELOPMENT COMPANY. Nov. 18th, 1912.

The Secretary, R. Covington, submitted to the meeting a statement showing the financial condition of the company, from which it appeared that the value of the assets of this Company at the present time is the sum of \$490,354.19, and the amount of indebtedness of every nature and kind is the sum of \$139,001.24, leaving a net worth of the company in the sum of \$331,352.95, a copy of said statement being inserted following these minutes.

It was moved and seconded that this Company declare a dividend of \$10.00 per share on the capital stock of the company, payable forthwith, and that said dividend be paid by turning over and conveying to the stockholders, property of the company of the net value over incumbrances as follows, to-wit:

Crown Coal & Coke Co. Stock.....	\$10,125.00
British Columbia Inv. Co. Stock.....	81,161.00
Mills Syndicate Coal Mines Stock....	18,776.50
Real Estate	92,000.00
Preston Farms Interest	52,937.50
Riparia Orchard Tract	45,000.00
<hr/>	
	\$300,000.00

The motion being put to vote, was unanimously carried.

WHEREAS, on the 18th day of November, 1912, a dividend was declared by International Development Company of Ten Dollars (\$10.00) a share on its capital stock, payable forthwith, the said dividend to be paid by turning over and conveying to the stockholders, property of the company as described in the minutes of said meeting, and as described in the division herein made.

NOW, THEREFORE, the undersigned, being all the stockholders of said company, and holding stock as follows, to-wit:

R. G. Belden.....	14,800 shares
A. E. Wayland.....	14,800 shares
R. Covington	400 shares

hereby agree that the said property included in said dividend shall be divided between them as follows:

Paintiff's Exhibit No. "17."

Journal International Development Company.

Plaintiff's Exhibit No. "18."

Cash Book, International Development Company.

Plaintiff's Exhibit No. "19."

Cash Book, International Development Company.

Plaintiff's Exhibit No. "20."

Stock Ledger, Michel Coal Mines, Ltd.

Plaintiff's Exhibit No. "21."

Certificate Book, Michel Coal Mines Ltd.

Plaintiff's Exhibit No. "22."

Certificate Book, Michel Coal Mines Ltd.

Plaintiff's Exhibit No. "23."

Articles of Agreement between International Development Company and S. W. O'Brien, by which O'Brien agreed to do \$500.00 worth of printing for 20,000 shares of Michel Company stock. Agreement annuled March 6, 1906.

Plaintiff's Exhibit No. "24."

Plaintiff's Exhibit No. "25"

Not introduced.

Plaintiff's Exhibits for identification "26" to "30" inclusive, not introduced.

Plaintiff's Exhibit No. "31."

Prospectus Michel Coal Mines Ltd., containing report, map, letters, and other information relative to the property of described as 1280 acres valuable coal lands in Crow's Nest District, B. C., issued by Inland Surety Company, Fiscal Agents.

The prospectus is devoted to telling who the company officers are including Hemphill, Hart, Penn, Harvey, Butterfield, & R. G. Belden. Map of district; report of Hemphill to officers and Trustees upon the property; geological formation; its proximity to other coal properties, and that one exposure of coal was found; and containing recommendations. Statement of Baptice Lameroux, that the ground "is just as good as the Crow's Nest Pass Company and the McInnis ground, and better; for in this ground the dip of the veins is such as to make it cheaper to mine," and letters from R. G. Belden through the Michel Coal Mines Company that he had made an examination of the company's property and that the formation was similar to other adjoining properties where coal had been discovered.

Plaintiff's Exhibit No. "32."

Nex Perce, Idaho, Mar 3 1910

A. E. Wayland,
Spokane, Wash.

Dear Sir:—

Should like to help the work along by subscribing in a small way for \$25.00 of stock if that will help any let me know.

Yours very truly,

R. W. Lloyd.

March 11, 1910.

Mr. R. W. Lloyd,
Nex Perce, Ida.

Dear Sir:

Replying to your favor of the 3d, I wish to say that according to the old adage, 'every little bit helps,' and we would be pleased to receive your subscription for \$25, as per the terms of the voluntary subscription now being made by the stock holders for the Michel tunnel.

I wish to say that outside of the subscriptions made at the annual meeting, several voluntary subscriptions have come in and others have expressed themselves as being willing to subscribe more in order to push the tunnel in as we have outlined.

I have recently returned from the property where I spent several days with the engineers in getting data for making the final report. They now have all the data at hand and are working on the report which will be completed in the near future. We have been assured that this report will enable us to secure all the money we need for the building of the Railroad, which as you know, is what we have been trying to finance and the construction of which will enable the Michel Company to begin shipping as soon as their tunnel is completed.

Am, personally, very glad to hear from you, as I have not been advised as to where you are in

business at the present time. Will be interested in any special news from that section of the country.

I beg to remain,

Very truly yours,

AEW-B

Secretary.

Nez Perce, Idaho, Mar. 15, 1910

A. E. Wayland,
Spokane, Wn.

My dear Wayland—

Just received your letter and hasten to answer it, and enclose the \$25.00 I promised to help further the work on the tunnel. I have faith that the officials at the head of the company are endeavoring to do their best for the benefit of the stockholders.

Yours sincerely,

R. W. Lloyd.

Mch. 18th, 1910

Mr. R. W. Lloyd,
Nez Perce, Idaho.

Dear Sir:

Beg to acknowledge receipt of your favor of the 15th inst. with enclosure of draft, \$25.00 for which I hand you herewith, certificate No. 400 for 125 shares in the Michel Coal Mines, Ltd.

We wish to thank you for this subscription and will say that we are using our best efforts to secure

railroad transportation this summer. As we probably have advised you, we had practically made arrangements for money for the building of the railroad spur when the recent panic struck the country, and as the people whom we had interested were mostly bankers, it was necessary for them to draw in their cash.

Again thanking you for the interest manifest in the Company, I beg to remain,

Very truly yours,

AEW-RC

Letter R. W. Lloyd to A. E. Wayland, March 3rd, 1910, offering to purchase \$25.00 worth of stock. Answer thereto stating that the report on property would soon be completed, and that the Company was assured it would be favorable. Letter of March 15th, 1910, of R. W. Lloyd to A. E. Wayland, enclosing \$25.00, and answer enclosing certificate No. 400 for 125 shares in the Michel Coal Mine Company.

Plaintiff's Exhibit No. "33."

Ledger International Development Company.

Plaintiff's Exhibit No. "34."

Cash Book No. "2," International Development Company.

Plaintiff's Exhibit No. "35."

Cash Book International Development Company, commencing August 1, 1912.

Plaintiff's Exhibit No. "36."

Ledger International Development Company.

Plaintiff's Exhibit No. "37."

Journal No. "2" International Development Company.

Plaintiff's Exhibit No. "38."

Journal No. "3" International Development Company.

Plaintiff's Exhibit No. "39."

Record Bills Receivable, International Development Company.

Plaintiff's Exhibit No. "40."

Record Bills Receivable, International Development Company.

Plaintiff's Exhibit No. "41."

Journal, Michel Coal Mines Ltd., beginning February 27, 1908.

Plaintiff's Exhibit No. "42."

Ledger, Michel Coal Mines Ltd., beginning February 27, 1908.

Plaintiff's Exhibit No. "43."

Cash Book. (Company not given.)

Plaintiff's Exhibit No. "44."

Stock certificate book Michel Coal Mines Limited, from certificates 501 to 586 inclusive.

Plaintiff's Exhibit No. "45."

Stock Certificate book, Michel Coal Mines Limited, from No. 251 to 500 inclusive.

Plaintiff's Exhibit No. "46."

Bills Receivable, Michel Coal & Coke Company.

Plaintiff's Exhibit No. "47."

Minute Book, Empire Coal & Coke Company, pages hereafter to be designated.

Plaintiff's Exhibit No. "48."

Journal, Empire Coal & Coke Company.

Plaintiff's Exhibit No. "49."

Ledger, Empire Coal & Coke Company.

Plaintiff's Exhibit No. "50."

Stock Ledger, Empire Coal & Coke Company.

Plaintiff's Exhibit No. "51."

Stock Certificate Book, the Empire Coal & Coke Company, Nos. 251 to 500 inclusive.

Plaintiff's Exhibit No. "52."

Stock Certificate book, Empire Coal & Coke Company, Nos. 1 to 250 inclusive.

Plaintiff's Exhibit No. "53."

Stock Certificate Book, Empire Coal & Coke Company, 501 to 609 inclusive.

Plaintiff's Exhibit No. "54."

Minute Book, Crow's Nest and Northern Railway Company, pages and numbers of exhibits to be hereafter specified.

Plaintiff's Exhibit No. "55."

Journal, Crown Coal & Coke Company.

Plaintiff's Exhibit No. "56."

Ledger account, Crown Coal & Coke Company.

Plaintiff's Exhibit No. "57."

Journal No. 2 Crown Coal & Coke Company.

Plaintiff's Exhibit No. "58."

Ledger, No. 2, Crown Coal & Coke Company.

Plaintiff's Exhibit No. "59."

Cash Book No. 2, Crown Coal & Coke Company.

Plaintiff's Exhibit No. "60."

Stock Ledger, Crown Coal & Coke Company.

Plaintiff's Exhibit No. "61."

Stock Ledger, Crown Coal & Coke Company.

Plaintiff's Exhibit No. "62."

Minute Book, Crown Coal & Coke Company.

Plaintiff's Exhibit No. "63."

Stock Certificate Book, Crown Coal & Coke Company, Nos. 1 to 250 inclusive.

Plaintiff's Exhibit No. "64."

Stock Certificate Book, Crown Coal & Coke Company, No. 251 to 500 inclusive.

Plaintiff's Exhibit No. "65."

Stock Certificate Book, Crown Coal & Coke Company, No. 501 to 750 inclusive.

Plaintiff's Exhibit No. "66."

Stock Certificate Book, Crown Coal & Coke Company, No. 751 to 1000 inclusive.

Plaintiff's Exhibit No. "67."

Stock Certificate Book, Crown Coal & Coke Company, 1001 to 1199 inclusive.

Plaintiff's Exhibit No. "68."

Note Register.

Plaintiff's Exhibit No. "69."

R. G. Belden,	A. E. Wayland,	J. H. Hemphill,
President.	Vice-President.	Secy-Treas.

INTERNATIONAL DEVELOPMENT
COMPANY

Spokane, Wash., Jan. 3rd, 1907

Mr. F. L. Farrel,
32 Chamber of Commerce,
Milwaukee, Wis.

Dear Mr. Farrel:—

I have carefully read your letter of the 29th ult, and also Mr. Smith's letter of the 28th ult to Mr. Belden relative to the action taken by the Inland Surety Company in sending out letters to the present stockholders of the Michel Coal Mines Ltd. relative to the consolidation with the Crown Coal & Coke Co. As I am bearing the blame for making this move I deem it necessary that I say something in connection with Mr. Belden and Mr.

Hemphill which will give you a clear conception of the circumstances.

From my point of view I will say in the beginning that both your and Mr. Smith's letters are more ludicrous than serious. As you undoubtedly know, or have reason to believe, the International Development Company is vitally interested in the success of the Crown Coal & Coke Co., and you are also aware, we were not making as rapid a start in the sale of the treasury stock as I thought would be necessary for completing the sale of the 100,000 shares by the time we ought to begin work.

Many of the Michel Coal Mines, Ltd., Stockholders are quite enthusiastic over the outcome of that district and had expressed their willingness to invest some capital in the property should they make a big showing. Having failed to make such showing as has been made on the Crown Coal & Coke Co.'s property I took the view that we could interest them in the Crown Coal & Coke Co. The first letter sent out, a copy of which was sent to you, I will admit was rather strong but I made it so purposely in order that it would interest them sufficiently whereby we could persuade them to buy some of the treasury stock of the Crown Coal & Coke Co. As to our consulting you in regard to the consolidation you understand that this suggestion was made to them by the *Inland Surety Company* which has nothing whatever to do with the Crown Coal & Coke Co. but as a company is

a copartnership which was organized expressly for the purpose of acting as fiscal agents for the sale of the stock of the Michel Coal Mines Ltd. From the tone of the letter sent you, you will undoubtedly see that we (the Inland Surety Co.) placed ourselves in the minority and would insist on the Michel stockholders to buy treasury stock in the Crown Coal & Coke Co. in order that they might cooperate with us, provided that such a condition could be brought about. I wish to refer you to the following passage in copy of letter sent you. "The fact which we (The Inland Surety Co.) want to present for your consideration at the present time is the *possibility* of securing a consolidation of the Michel Coal Mines Ltd. with the Crown Coal & Coke Co. which has recently been formed by *Eastern capitalists*, for the development of a large tract of coal land adjoining and lying immediately North of the property of the Michel Coal Mines Ltd." From this passage you will see that I (writing as the Inland Surety Co.) present it in the light of a tentative proposition without any definite promises whatever. In my subsequent letter to these same people I dealt exclusively with the merits of the Crown Coal & Coke Co.'s properties. In answering inquiries and in personal conversation we did not put the argument so strong as in the first letter but stated the exact facts. As Mr. Hemphill has stated to you this method has brought results already and there is further indication that it will

mean the sale of several thousand shares of Crown Coal & Coke Co. stock and the purchasers are buying it with a clear understanding of the situation.

When the subject is once introduced which was the purpose of my first letter a copy of which was sent you it is then easy to get them to look into the merits of the Crown Coal & Coke Co. After this is done only a few words will suffice to overcome any false impression that might be inspired by the first letter.

As a matter of fact, I believe it a very good move to get as many of the Michel people interested in the Crown Coal & Coke Co. as possible as it will mean a more friendly feeling between the companies. So far as this move is concerned I have no apology to offer and would feel very much inclined to resent any insinuation that we are misrepresenting any facts whatever. However, I can understand that you and Mr. Smith might be misled in deducting conclusions when you failed to consider the fact that this proposition was made by the fiscal agent of the Michel Coal Mines Ltd. to the stockholders of that company, and is in no way compromising the Crown Coal & Coke Co.

Now, Mr. Farrel, personally I assure you that no one has the interest of the Crown Coal & Coke Co. at heart more than myself, and in connection with Mr. Belden and Hemphill I have cooperated

in every way possible to bring it to its present condition for presentation as an investment.

Trusting this explanation will bring the matter before you in a different light, I beg to remain,

Very truly yours,

AEW-MR

A. E. Wayland.

P. S. The object of the above letter is clearness and not neatness as you will see by the scratches which I have inserted purposely as the explanatory antecedents of some of the pronouns used. In short the letters sent to the Michel people were signed Inland Surety Co. Per A.E.W. After the party became interested his inquiries were turned over to the International Development Co., which dwelt upon the merits of the Crown Coal & Coke Co.'s property as its fiscal agent. While the Inland Surety Co. and the International Development Co. are practically composed of the same individuals yet in the eyes of the stockholders of the Michel Coal Mines, Ltd. they are two definite and distinct concerns. I again ask you to consider the proposition in this light and you will see that the position of the Crown Coal & Coke Co. was in no way whatever compromised.

AEW.

Plaintiff's Exhibit No. "70."

INLAND SURETY COMPANY

Spokane, Wash., Dec. 8, '06.

Mr. F. W. Boyd,
Freize, Idaho.

Dear Sir:—

As a stockholder of the Michel Coal Mines, Ltd., we believe that you are interested with us in the success of the company. At this writing we will not go into detail in regard to the progress that has been made this summer, as it is the intention of the company to issue a detailed report in the near future, a copy of which will be sent to you. We wish to say, however, that nearly all of the directors and a number of the heaviest stockholders visited the property this summer and fall and expressed themselves as very much pleased with the outlook, and also congratulated the management on the progress of the work, the economy and low cost of work done.

The fact that we want to present for your consideration at the present time is the possibility of securing a consolidation of the Michel Coal Mines, Ltd., with the Crown Coal & Coke Company, which has recently been formed by eastern capitalists for the development of a large tract of coal land joining and lying immediately north of the property of the Michel Coal Mines, Ltd. It is well known fact that better results can be obtained through a

combination of this kind, as competition is more or less eliminated, and it is quite sure to follow a considerable reduction in the cost of operation. The consolidation of these two companies would give the combined companies control of practically all of the good coal land situated on the summit of the Rock Mountains and in our vicinity.

The members of this office, all of whom are heavily interested in the Michel Coal Mines, Ltd., have recently invested heavily in the stock of the Crown Coal & Coke Company, and have been recognized in the management of that company to the extent of being named as three of the Board of Directors. We intend to continue investing in this stock as heavily as possible, and if we can get sufficient backing from our clients and the present stockholders of the Michel Coal Mines, Ltd., we are confident of securing sufficient control in the Crown Coal & Coke Company to bring about the consolidation.

There has been considerable work done on the property of the Crown Coal & Coke Company, which taken together with the exposures of the veins through erosion, makes it very easy to ascertain the dimensions of the several veins, whose thickness are outlined in the enclosed prospectus. We hope that you will see your way clear to join us in acquiring as large a block of their stock as possible in order that we may have your co-operation in carrying out our plans as outlined herein.

The Crown Coal & Coke Company has just authorized the sale of 100,000 shares of their treasury stock at 25c per share, and we believe this does not represent the actual value of the property. Subscriptions for this stock can be made at the office of the International Development Company, which is acting as fiscal agents.

Very truly yours,

Inland Surety Company,

A.E.W.-R.C.

Per A E W.

Plaintiff's Exhibit No. "71."

Letter, December 17, 1906, Inland Surety Company, per A E W, to J. S. Hogue, which encloses a map and description of the Crown property, cost of mining, etc., net profit per ton, and urging investment in some of the stock.

Defendants' Exhibit No. "72" and "73."

Identified by witness but not introduced.

Defendants' Exhibit No. "74."

Letter, Hogue to R. G. Belden, introduced as part of witnesses' cross examination, and acknowledging receipt of coal.

Plaintiff's Exhibit No. "75."

Letter to Mr. Grove marked for identification but not introduced.

Plaintiff's Exhibit No. "76."

Letter, Inland Surety Company, per A E W, Feb-

ruary 19, 1906, to F. W. Boyd, Palouse, Washington, relative to purchase of Michel stock, stating that all subscriptions at 05c per share will close Saturday, the 24th, and contains the following: "By buying Michel stock now, and burning Michel coal next winter, you will not only solve your fuel question, but will make a fortune even if this stock advances only one-tenth as much as the Crow's Nest."

Defendants' Exhibit No. "77."

Letter, from the Michel Company, per M C M, February 12, 1906, to Charles Hill, Hartline, Washington, relative arrangement with Mr. Belden to dispose of a portion of his (Hill's) stock to realize a portion of the \$500.00 invested.

Defendants' Exhibit No. "78."

Was a letter dated 12-20-06, Charles Hill to Inland Surety Company inquiring the reason for his not receiving circulars the same as other shareholders received.

Defendants' Exhibit No. "79."

For identification, not introduced.

Plaintiff's Exhibit No. "80."

Letter, A. Eugene Wayland, April 6, 1906, to C. L. Butterfield, Moscow, relative Michel property. Letter deals with Wayland's visit to the property, and describes the formation, and contains the following marked by the District Attorney: "We

dug down in the snow a few places, where we thot the conditions looked favorable for the exposure of coal, and found coal in almost every place."

Defendants' Exhibit No. "81."

Admitted as part of cross examination of Baptice Lameraux, which contains the following:

"In looking over timber this winter I found the vein of coal that I was looking for last fall on your claim, and I can show it to you at any time, E. T. C."

Defendants' Exhibit No. "82."

Letter, Lameraux to International Development Company, Feb. 12, 1906, as part of his cross examination, and refers to finding a vein of coal on the Michel property.

Defendants' Exhibit No. "83."

Not introduced.

Plaintiff's Exhibit No. "84."

Circular letter, Michel Coal Mines Limited, per R. G. Belden, to the Stockholders, relative financing Crow's Nest and Northern Railway Company, stating arrangements had been made and that all the money necessary would be available to build the road, and requesting stockholders in Michel to purchase stock in the Crown, and detailing advantages to them, and asking for monthly subscriptions for 1 to \$10.00 for stock.

Plaintiff's Exhibit No. "85."

Not introduced.

Defendants' Exhibit No. "86."

Attached to Plaintiff's Exhibit No. "32."

Defendants' Exhibit Nos. "87" & "88."

Not introduced.

Plaintiff's Exhibit No. "89."

Articles of Incorporation, Crown Coal & Coke Company.

Incorporators: R. G. Belden, A. E. Wayland, and E. M. McKerr-Kastan.

Object: Lease, buy, sell, develop, promote, bond, etc., coal and other claims.

Capital stock: \$2,000,000.00, \$1.00 per share.

Trustees: F. L. Farrel, H. A. Smith, A. Balantine, F. W. Tolles, J. T. Nevin, C. M. Gerwig, H. M. McKerr-Kastan, R. G. Belden.

Executed: August 25, 1906.

Plaintiff's Exhibits Nos. "90" to "99" Inclusive
Are the British Columbia Mining Licenses of J. H. Hemphill, Emily Corner, Martha Corner, F. W. Hemphill, A. C. Hemphill, T. J. Demorest, W. J. Demorest, B. E. Belden, A. E. Wayland and R. G. Belden, respectively.

Plaintiff's Exhibit No. "100."

Certificate No. "9," Crown Coal & Coke Company, 50,000 shares issued to L. Whitney, January 2nd, 1909, marked across face, "Cancelled 1-2-07."

Certificate No. "11," Crown Coal & Coke Company, 100,000 shares issued to William A. Hemphill, January 2nd, 1907, marked on face "Cancelled 1-2-09."

Plaintiff's Exhibit No. "102."

Printed copy of Act Legislative Assembly, Province of British Columbia, incorporating Crow's Nest and Northern Railway Company, with Russel G. Belden, J. H. Hemphill, C. L. Butterfield, and A. E. Wayland, as the body corporate.

Plaintiff's Exhibit No. "103."

Page 13, Minute Book, Crown Coal & Coke Company. Letter or proposition R. G. Belden to Crown Coal & Coke Company offering to sell to Company ten coal locations in Kootenai district, B. C., for \$2,000,000.00 or in lieu thereof, 1,999,991 shares of capital stock of Crown Coal & Coke Company out of which he agrees to place in Treasury for development 750,000 shares and to deliver 100,000 shares to the original locators, and 150,000 shares to the Secretary, subject to the order of 14 different persons ranging in amounts from 3 to 22,000 shares, including A. E. Wayland, who received 22,500, and R. G. Belden, 15,000, and agreed to deliver stock to 10 different persons in amounts from 25 to 125,000 shares.

Plaintiff's Exhibit No. "104."

Pages 20 & 30, Minute Book Crow's Nest & Northern Railway, being the minutes of the Directors' meeting held at Spokane, July 2nd, 1908.

Present: J. H. Hemphill, C. L. Butterfield, R. G. Belden, and A. E. Wayland.

The application of the following persons to purchase stock at par were accepted: Crown Coal & Coke, 1000 shares; C. L. Butterfield, R. G. Belden, A. E. Wayland, and J. H. Hemphill, 1 share each.

Meeting of the stockholders was voted to be held August 11, 1908.

Plaintiff's Exhibit No. "105."

Page 31, Minute Book, Crow's Nest & Northern Railway Company, being an application of the Crown Coal & Coke Company to purchase 1000 shares of railway stock at \$100.00 per share.

Plaintiff's Exhibit No. "106."

Being pages 39-40 & 41 of plaintiff's exhibit 54, being a meeting of the board of directors of the railway company held at Crow's Nest, British Columbia, August 11, 1908.

Present: C. L. Butterfield, J. H. Hemphill, R. G. Belden, and A. E. Wayland, which among other things was accepted by the directors a proposition of the International Development Company the complete charter covering the authorized construc-

tion of the Crow's Nest and Northern Railway Company as set forth in the special act of the British Columbia parliament of Feb. 1908, for 4,995 shares of railway stock, with the exception of 500 shares which was to be retained by the International Development Company. 2,000 shares of the Crown and 660 shares to the Michel, and agreed to hold the balance, together with the stocks and all amounts derived from such sale to the above named coal company to be used exclusively for promoting the interests of the railway company, together with that of coal companies as may from time to time be deemed best. \$90,000 was voted Crown Coal & Coke Company for right-of-way and the Crown Coal & Coke was given credit, and received 1,000 shares of railway stock fully paid up.

The following officers were elected for the ensuing year: James A. Williams, President; C. L. Butterfield, and J. H. Hemphill, Vice-Presidents; A. Eugene Wayland, Secretary-Treasurer.

Plaintiff's Exhibit No. "107."

Prospectus Crown Coal & Coke Company, giving general information regarding the company, names of the officers, location of claims, transportation, comparison of the Crown with other coals, and report of Robert R. Gamble to the effect there are 486,400,000 tons of coal on the company's property.

Plaintiff's Exhibit No. "108."

Letter dated September 6, '06, R. G. Belden to

F. L. Farrel, marked "Dict. I.D.C.-R.C." as follows: "I have wired you as follows which I now confirm: 'All papers mailed. If practical hold meeting Tuesday. Absent directors will waive notice. Writing fully. Tolles must attend.'

You will notice among the enclosed papers a form which the different directors who are not present at the meeting can sign, waiving notice of the directors meeting, which will make your meeting legal on short notice. I will secure the balance of the signatures later on. What I meant by saying that Tolles must be present is this: Tolles has already been named as a director in the articles of incorporation and they have been filed, therefore, to make a quorum, he should be present and after completing the organization he may hand in his resignation, and you may elect Martin Anderson or any other individual you desire to fill his place, this being according to the by-laws.

You will also notice among the papers I have drafted up the minutes for the form for you to go by so as to make everything regular under the laws of this state. The letter which is marked No. 1 is a tender of the property on my part to the company and according to the minutes you will accept my offer which will make the stock fully paid under the laws of this State."

The balance of the letter is a direction how to issue certain stock.

Plaintiff's Exhibit No. "109."

Letter, July 10, 1906, R. G. Belden to F. L. Farrel, regarding the analysis, and giving the analysis of different coal mines in that vicinity, and contains the following clause, marked by the district attorney: "I do not anticipate that Mr. Wheeler's withdrawal will in any way affect any of the other parties and feel, as I said before in my letter to Mr. Smith, that as long as Mr. Wheeler does not agree with the idea of the rest of the people in regard to developing the property it is best not to try and induce him to come in. I do not fear in the least of our plans being thrown out of gear by his withdrawal, as Pittsburgh stands ready to absorb any of the shares left which will give the control to the eastern people. We will see that you are protected in this, even if one share would have to be placed later on. This you may consider binding on our part to see that you get control."

Plaintiff's Exhibit No. "110."

Letter, December 12, 1907, R. G. Belden, to F. L. Farrel, relative to giving Farrel a chance to subscribe for stock, and contains the following: "So if you wish to take 10,000 shares you can forward me the money and I will send you at once a receipt for so much stock from the International Development Company and then when you come out in January we will place the papers in the bank so that you will have it direct from the bank.

Understand in giving you the chance to join us on this stock subscription, we are assuming that you will bend your efforts to make Spokane your future home, so as to throw the weight of your holdings with the control here. This would give us a handsome control and I think would be better for all of us."

Plaintiff's Exhibit No. "111."

R. G. Belden,	A. E. Wayland,	J. H. Hemphill,
President.	Vice-President.	Secy.-Treas.

INTERNATIONAL DEVELOPMENT
COMPANY

Spokane, Wash., Dec. 24th, 1908.

Mr. F. L. Farrel,
32 Chamber of Commerce Bldg.,
Milwaukee, Wis.

Dear Sir:

Yours of the 15th and 18th at hand and it is very evident that the mails have been interfered with by the heavy rains throughout this district.

In regard to the rumor relative to the consolidation of the Crown Coal & Coke Co. with that of the Michel Coal Mining Co., Limited, will say that this is one of Wayland's schemes to make sales of stock in the Crown Coal & Coke Co. to the stockholders of the Michel Co. who as you know are our clients. This was done after talking the matter over with Mr. Butterfield, myself and one or two other directors in the Michel Co., and we

agreed that his plan was good. As far as the consolidation is concerned this will receive no serious thought, but you of course understand this would have to rest entirely with the Crown Coal & Coke Co., but there are a great many advantages to be derived by the Michel Coal Mining Co., Limited, through the Crown Coal & Coke Co. such as the removing of all competition, building of railroads and producing mine, etc., which would make the Michel Coal Mines Co., Limited, much more valuable, and it is our desire that the stock-holders of the Michel Coal Mines Co., Limited, shall assist and encourage the Crown Coal & Coke Co. by subscribing for the stock.

This appears to meet with their approval and I made a sale Saturday of 500 shares to one of these people, and have received other correspondence and promises from others.

You understand our clients are among the farmers and we always conduct their affairs as we think best for their interests, knowing that we are in a better position to judge than they themselves, and for this reason we some times take such courses as Wayland's in order to make them look favorably on our proposition.

Yours very truly,

RGB-MR

R. G. Belden.

R. G. Belden,	A. E. Wayland,	J. H. Hemphill,
President.	Vice-President.	Secy.-Treas.

INTERNATIONAL DEVELOPMENT
COMPANY

Spokane, Wash., Jan. 3rd, 1907.

Mr. F. L. Farrel,
32 Chamber of Commerce Bldg.,
Milwaukee, Wis.

Dear Sir:

Yours of the 29th ult. at hand and contents noted. Will say that I am not going to say much about the controversy inasmuch as you known I am somewhat hotheaded and naturally resent any statements in regard to my not having been careful in the proper representation of facts therefore I have left your letter, also Mr. Smith's for Wayland and Hemphill to answer. I simply make this suggestion, that you evidently did not read my letter carefully nor did you take into consideration that no sales are closed up without further communication and usually with a personal interview, and at such time everything will be stated frankly to any intended purchaser. I believe there are few firms who receive as many letters from their clients as we do expressing their confidence and satisfaction in the way we have handled their business.

Respectfully yours,

RGB-MR

R. G. Belden.

Plaintiff's Exhibit No. "112."

Letter, January 3rd, '07, R. G. Belden to F. L. Farrel, which refers chiefly to a controversy over consolidation, and the fact that some company was not registered in British Columbia, and contains the following: "At the meeting the only thing that will be necessary will be the reelection of the trustees and I anticipate that there should be no change therefore we will vote and elect the directors as they now stand. Hemphill has suggested now that Mr. Barnes is coming in that there ought to be a director at Minneapolis and he suggested Kerr who stands very high. He argues that not only from the fact of the two syndicate members but because Kerr is a very strong man and because Barnes seems to be taking an active interest in the sale of stock and we would like to lend him every encouragement that we can. If this is done we want the suggestion to come from you people at Milwaukee as to whose place he shall take. If you have a weak member in Milwaukee then it would be an excellent plan to have Mr. Kerr elected."

Defendants' Exhibits Nos. "113" to "117" Inclusive.

Letters identified, but not introduced.

Plaintiff's Exhibits Nos. "118," "119" & "120."

Prints or pictures of the different coal fields, or claims owned by the companies.

Plaintiff's Exhibit No. "121."

Letter July 14, 1906, signed R. G. Belden, marked "Dict. I.D.C.-R.C." to A. Ballantine, Milwaukee, relative to a proposition to give him the one-half share in the coal proposition about to be taken up with Milwaukee, Pittsburgh and Minneapolis people, telling him it was a good thing, and he was fortunate in having an opportunity to come in, and agreeing to give him any desired information, and contains the following: "The only point at issue is the work which must be done in co-operating in the flotation of our company and we feel very confident that with the assistance of you eastern people that this will be a very easy matter. The public today are very anxious to invest in coal and with the showing that we can make to the investing public, we should have no difficulty whatever in raising sufficient money to develop the property and bring it to a productive stage in a very short time. In investing in this proposition there is one thing that you can count on absolutely, and that is that you are in on the ground floor basis and I believe that you would be surprised at our being able to secure this property for so small a figure were you in a position to visit it. I think that both Messrs. Farrel and Smith will agree with me that the—etc."

Plaintiff's Exhibit No. "122."

Letter August 24, 1906, A. Ballantine from International Development Company, per R. G. Belden,

marked "Dict. I.D.C.-R.C." and contains the following: "We are pleased to inform you that after considerable difficulty, we have, at least, the affairs of the coal company all in satisfactory shape and must make our payments on the purchase price at once. The papers transferring the title are held by the Bank of Montreal of this city, with instructions as specified in the letter, a copy of which we herewith enclose. We do this so that you may fully understand under just what conditions the bank holds the papers, and we hope that you will rush in your subscription at the earliest possible date. The letter of instruction calls for only ten days from date, but in case of necessity this can be extended should any member be out of town or for any other reason be unable to make his remittance at once."

Plaintiff's Exhibit No. "123."

Annual meeting stockholders of the Crown Coal & Coke Company, January 21, 1908, on page 17, Minute Book of the Company, which recites that the general manager gave a review of the past year's work; sales of Treasury stock reported to date was approved and it was decided that directors be authorized to sell all stock necessary for development and for railroad, and subscribe toward the railroad such amount as they deem advisable; section 4, article 2, of by-laws was amended giving managing director general management of all affairs pertaining to the operation of the property for the board of trustees, and shall be responsible and report only to them;

an election was held and C. L. Butterfield, R. S. Butterfield, F. L. Farrel, I. A. Barnes, R. G. Belden, J. H. Hemphill, J. T. Nevin, F. H. Mason, and A. E. Wayland were elected directors for ensuing year.

Plaintiff's Exhibit No. "124."

Page 19, Minute Book, Crown Coal & Coke Company. Annual meeting of directors January 21, 1908.

Present: C. L. Butterfield, F. L. Farrel, R. Butterfield, J. H. Hemphill, R. G. Belden, A. E. Wayland, and F. H. Mason; and the following officers were elected for the ensuing year: C. L. Butterfield, President; F. L. Farrel, 1st Vice President; R. G. Belden, 2nd Vice President, and General Manager; A. E. Wayland, Secretary-Treasurer; R. Covington, Asst. Secretary.

Plaintiff's Exhibit No. "125."

Pages 20 & 21, Minute Book, Crown Coal & Coke Company, being special meeting of the directors, January 21, 1908.

Present: C. L. Butterfield, R. S. Butterfield, J. H. Hemphill, R. G. Belden, and A. E. Wayland.

General Manager reported he had subscribed for 1,000 shares of the Crow's Nest & Northern Railway at par value at \$100.00 per share. On motion the action was approved.

Thereupon discussion was opened for a sufficient additional subscription of stock of the Crow's Nest & Northern Railway Company to enable the Crown Coal & Coke Company to control all stock that was

to be called up in said railway company. After assurance from the Provisional Directors of the Crow's Nest & Northern Railway Company that an additional 2,000 shares would control all called up stock of the said railway company, it was moved by Mr. R. S. Butterfield and seconded by Mr. Wayland that the 2,000 shares of railroad stock be purchased by paying therefor 150,000 shares of the Treasury stock of the Crown Coal & Coke Company, and that the Secretary be and is hereby authorized to issue said 150,000 shares from the Treasury to be delivered upon receipt of 2,000 shares of fully paid Crow's Nest & Northern Railway stock.

On motion the foregoing was adopted.

Plaintiff's Exhibit No. "126."

Same as No. "106."

Plaintiff's Exhibit No. "127."

Page 49, Minute Book, Crow's Nest Railway, being special meeting of the directors held November 29, 1910, for considering the sale of 120,400 shares of the stock in Crown Coal & Coke belonging to the Crow's Nest & Northern Railway, and on motion it was voted to sell same at 50c per share, and to take notes in payment, and it is further determined that the International Development Company vote the Crown stock held by the Crow's Nest at any stockholders meeting of the Crown, and a resolution was adopted authorizing the board of trustees to purchase 200,000 shares of the Treasury stock of the Crown, 100,000 shares at 50c per share,

and 100,000 shares at 75c per share. \$50,000 to be paid by notes, secured from sales stock, and the balance the stock was delivered.

Plaintiff's Exhibit No. "128."

Pages 54 & 55, Minute Book of Crown Coal & Coke Company, being record of the annual meeting board of trustees, January 27, 1911.

Present: C. L. Butterfield, A. Hobson, and A. E. Wayland.

After election of officers proposition of securing funds and the proposition of the railway company in plaintiff's exhibit "127" was accepted.

Plaintiff's Exhibit No. "129."

Page 25, Minute Book, Empire Coal & Coke Company. Record, annual meeting of stockholders January 19, 1911. Nothing marked or read into the record.

Plaintiff's Exhibit No. "130."

Page 56, Minute Book, Michel Coal Mines Limited. Annual meeting of stockholders. January 15, 1912. Nothing marked or read into the record.

Plaintiff's Exhibit No. "131."

Page 25, Minute Book, Empire Coal & Coke Company. Same as exhibit "29."

Plaintiff's Exhibit No. "132."

Page 38, Minute Book, Crown Coal & Coke Company, adjourned stockholders' meeting of Company

January 19, 1910. No part of minutes marked or read into record.

Plaintiff's Exhibit No. "133."

Page 50, Minute Book, Crown Coal & Coke Company, being minutes of annual stockholders' meeting January 17, 1911, and the following trustees were elected: C. L. Butterfield, A. Hobson, A. Woods, J. Greerlong, A. E. Wayland. No parts of the minutes marked or read into record.

Plaintiff's Exhibit No. "134."

Page 66, of same Minute Book. Special meeting of stockholders August 21, 1911, relative bonding property of company for \$1,000,000.00. No part of the minutes marked or read into record.

Plaintiff's Exhibit No. "135."

Page 73, same Minute Book. Special meeting stockholders, October 10, 1911.

Object: Increasing capital stock from 2 to \$3,000,000.00.

Plaintiff's Exhibit No. "136."

Pages 116, 17, 18 & 119, Minute Book of said Company, being special meeting of stockholders, October 7, 1912.

Object: Selling bonds of company.

Plaintiff's Exhibit No. "137."

Page 126, Minute Book of said company (Crown), being special meeting of stockholders November 1, 1912. No part marked or read into record.

Plaintiff's Exhibit No. "138."

Page 25, Minute Book International Development Company, record trustees' meeting January 10, 1910.

Present: R. G. Belden, and A. E. Wayland. At which meeting A. E. Wayland was appointed to vote all the stock held by the company, both directly and as trustee at the annual meeting of the Crown Coal & Coke Company to be held January 18, 1910, and R. G. Belden was authorized to vote at said meeting stock standing in the name of the company in the Michel, Mill Syndicate, and Empire.

Plaintiff's Exhibit No. "139."

Page 26, Minute Book, International Development Company, record of minutes special meeting trustees, July 30, 1910.

Present: R. G. Belden, and A. E. Wayland.

Object: Authorizing A. E. Wayland, or R. G. Belden, to vote all the stock owned by the International Development in the Crown, Michel, Empire, and Mills Syndicate, at all meetings of said company.

Plaintiff's Exhibit No. "140."

Page 27, Minute Book, Part of minutes of exhibit 139.

Object: Authorizing R. G. Belden, or A. E. Wayland to vote stock of the Crow's Nest & Northern Railway Company held by the International Development Company.

Plaintiff's Exhibit No. "141."

Page 3, Minute Book, Empire Coal & Coke Company, being articles 3 & 7 of the articles of incorporation of said company. Article 3 capital stock \$1,500,000.00, \$1.00 per share, par value. Article 7, providing for 7 trustees with A. S. Charlton, R. E. Muir, W. J. Graham, John Marsh, E. J. Boteet, Luke Faires, and R. G. Belden, as trustees.

Plaintiff's Exhibit No. "142."

Page 7, Minute Book of Empire Company, containing proposition of R. G. Belden, to sell 1240 acres of coal land for \$1,500,000.00, or in lieu 1,500,000 shares of capital stock, agreeing to place in the treasury 500,000 shares and the company to deliver 1,000,000 shares to the 50 persons named in the proposition, ranging from a few to 100,000 shares or more each.

Plaintiff's Exhibit No. "143."

Page 12, Minute Book of Empire Company, record organization meeting second board of trustees of said company. Motion carried making International Development Company fiscal agent and authorizing it to sell Empire Treasury Stock at 25c per share.

Plaintiff's Exhibit No. "144."

British Columbia Mining License A. J. Giles.

Plaintiff's Exhibit No. "145."

British Columbia Mining License A. Cope.

Plaintiff's Exhibit No. "146."

Prospectus Empire Coal & Coke Company, giving general description of the corporation, service indications of the property, the statement that "In the opinion of the most competent engineers and geologists, the extension of these coal veins (Crown) underlie the entire property of the Empire without any material variation in thickness.

Plaintiff's Exhibit No. "147."

Letter April 2nd, 1909, International Development Company, per R. G. Belden to C. A. Bryan, describing in a general way the property of the Empire Coal & Coke Company, its proximity to the Crown Company, and the presence of coal on the Crown, and offering inducements to Mr. Bryan to purchase stating there is no doubt that the veins of the Crown extend under the Empire, and stating further as follows: "The coal companies of this valley are all interested in the railroad, and it is built solely to handle their output. The charter has already been granted; survey completed, approved and accepted by the government; the right-of-way purchased; considerable right-of-way cleared; and several thousand ties already stacked on the right-of-way, etc."

Plaintiff's Exhibit No. "148."

Letter July 23, 1910, R. G. Belden, per "C" to C. A. Bryan relative sales of stock in the vicinity of Freewater, Oregon. The letter contained among other statements the following: "If I were you I

would not let anything interfere with my work. I would not put off even an hour seeing people that you feel that you might interest. Go after them good and hard. Use Crown as a bait where you think it will assist in getting business."

Plaintiff's Exhibit No. "149."

Letter, May 19, 1910, A. E. Wayland to C. A. Bryan, relative to sale of stock. Among other the following: "The immediate future could not look better than the present opportunity for business could not be better, the indications are that the farmers in the west are going to get the very best of prices for their products this fall on account of the failure of crops in the east. The farmer can always be induced to do business on future prospects rather than on his present condition."

Plaintiff's Exhibit No. "150."

Letter, R. G. Belden to C. A. Bryan, November 8, 1910. "Am very anxious that our sales count up now as Hobson and I have laid out plans in regard to our work at the property, and it is up to you fellows to supply us with the cash to go ahead with the work. If you will do the business so that Hobson and I can get things lined up, we will show you how to make things appear up there so that people will be enthused at once with the property.

As soon as we get the ties and right-of-way cleared on the upper five or six miles, we are going to lay

the ties out ready for the rails so as to make it appear as practically built. You can understand how this would appear to investors, and it certainly should make a great hit.

Defendants' Exhibits Nos. "151" to "156" inclusive were letters written by and to witness Faires as part of his cross examination.

Plaintiff's Exhibit No. "157."

Letter of December 7, 1908, to which Mr. Belden's name is signed and addressed to Luke Faires, as follows: "I have just been up to the Bank of Montreal and read over the two letters, one to your side kicker and one to the Cashier of the Bank. Now, owing to the wording of the letter being so strong, I did not think it advisable to ask Buchanan, the Mgr., to change the reading. He, however, referred only to the Crown Coal & Coke Company. The letter to your side kicker is short but the letter to the Cashier of the Bank occupies the full page and is much stronger than the letter to your side kicker. He refers in both letters to the Crown Coal & Coke Company, therefore, I am writing you another letter which is enclosed herewith and dated back so that it will not appear as an explained letter of the Bank of Montreal's letter. You can show this so as to make it appear that the principal holders of the Crown Company have been advised by their Chief Engineer to pick up or grab at once the Empire property, as it is as favorable as the

Crown, although the development has not been done on it that has been done on the Crown. This letter coming from the Bank of Montreal, which has a capital of \$11,000,000, should be of vast assistance to you and you should utilize it to the fullest extent. Get a copy of the original letter, that is the one to the Cashier of your Bank, so that you can show it, leaving the original for him to show. I think from this that you will grasp the meaning which I intend that you shall use with the accompanying letter dated Dec. 3rd. Of course you can let this appear as though it has been received by you prior to this date and that you did not care to let the information be known generally."

Dec. 3rd, 1908.

Mr. Luke Faires,
Payette, Ida.

Dear Faires:

Now, Faires, it was not my intention in this matter of floating the Empire Coal & Coke Company to put you in touch with the real facts of the conditions, but I think that by your guarding it properly, I can especially trust you with this information, which means a great deal to us, who have already gone into this proposition.

As you know, the Empire Coal & Coke Company's property adjoins the Crown Coal & Coke Company on that portion of the Crown Coal & Coke Company's ground which has been thoroughly

proven and the Chief Engineer of the Crown Coal & Coke Company has examined this ground thoroughly and reported that we could not afford not to take up this ground at once. As you know, the chief stockholders of the Crown Coal & Coke Company have also subscribed very heavily in the Empire Company's subscriptions. This means, as an inside tip, that we are following the instructions of the Engineer of the Crown Coal & Coke Company that we should at any cost secure this property of the Empire Coal & Coke Company, as it is fully as valuable as the Crown Coal & Coke Company's property although not so thoroughly developed. He reports that there is absolutely no question but what the veins of the Crown Coal & Coke Company extend under the ground of the Empire Coal & Coke Company, therefore, there is the opportunity for us to make a mint of money in taking over this property. Were it not for the fact that we do not believe in borrowing very heavily, we would certainly take the entire property and you people, under the offer which we have authorized you to make, are securing this property at the same cost which we are paying. If every there was a ground floor proposition, this is it.

Remember this, that the people you approach must be people who have some influence in their community, so that it will be of assistance to us should we in the future, desire to secure money outside of our own assistance for the development

work. This, however, as I have told you will require but very little money.

You will understand why we do not care to approach people already interested in the Crown Coal & Coke Company, from whom we could secure the money for the asking, which is that we desire to have the two companies receive twice the dividends that would be received from the one company operating all the ground.

Trusting that you will treat this confidential, I am

Very truly yours,

INTERNATIONAL DEVELOPMENT CO.,

Per

RGB-RC

P. S.—This enclosed letter of the 3rd is worded with the idea that you can use it to make your investors believe that they are getting in on the ground floor on a proposition which the people who are closest in touch with the Crown Coal & Coke Company know is an excellent proposition. With this letter and the letters which you have from the Bank of Montreal, you can explain that even to the Bank of Montreal we have not allowed them to know that we are getting this property at this time. Of course you will understand that in handing this letter out you must explain that you are only doing it in the strictest conditions of confidence in the man to whom you show it. That he is a special man whom you trust and that we

did not write the letter with any intentions that you should show it. Therefore, he must treat it with absolute confidence.

R. G. B.

Defendants' Exhibits Nos. "158" to "174" inclusive were letters identified as received and written by A. Hopson.

Plaintiff's Exhibit No. "175."

Freewater, Ore., Jany 14th, 1910.

Mr. R. G. Belden,
Spokane, Wash.

My dear Belden:—

I have just been to Milton by request of Mr. Elam and while talking to him on the streets Messrs. John and Colin McEwen, Dunlap and W. C. Hopson came up and joined in the conversation and it was decided that we had a meeting here Monday at one o'clock to decide on four others beside Mr. Vinson and myself to go up to the meeting on the 20th, think W. C. Hopson will be one of the number as they all claim that he is a well posted man in bookkeeping and they want a committee to go over the books of the company and make a report on them. Elam said that he got into a proposition once where the promoters sold their stock and let the stock of the company go unsold and by so doing the property was not developed and he thinks it a good time to look after this. He

said he is not uneasy but this is a necessary precaution to take right now. So I think Freewater and Milton will be represented with at least six. I told them that there would be very little news to be had at this meeting as it has been only a few days since we gave them all we had, but we were glad to have them go and satisfy themselves, this would be quite satisfying to others too, that might be holding back on a skeptical basis.

I will come up Tuesday unless something prevents.

Yours very truly,

C. A. Bryan.

Plaintiff's Exhibit No. "176."

Letter, January 15, 1910, R. G. Belden to C. A. Bryan, urging him to read letter at meeting of intending purchasers.

Plaintiff's Exhibit No. "177."

Letter, January 15, 1910, International Development Company, per R. G. Belden, to C. A. Bryan, relative to extension of tunnel and committee from Freewater coming to examine books, and the condition of work in the office being such as to make it impossible to have the books and accounts ready for inspection by the 20th, and suggesting the delay until February 15th.

Plaintiff's Exhibit No. "178."

Letter, September 22nd, 1909, R. G. Belden, to

C. A. Bryan, relative preparation for prospectus, by Belden and Wayland.

Does not state what company.

Defendant's Exhibits Nos. "179" to "182" inclusive were identified.

Plaintiff's Exhibit No. "183."

Letter, January 18, 1911, International Development Company, per R. G. Belden, to John Neiderer, being the letter contained in the first count of the indictment.

Defendants' Exhibit No. "184."

Next identified.

Plaintiff's Exhibit No. "185."

Letter, January 21, 1911, International Development Company, per A. E. Wayland, to Walter J. Wood, Waitsburg, Washington, being letter set out in second count of the indictment.

Plaintiff's Exhibit No. "186."

Pages 29 & 30, Minute Book, Empire Coal & Coke Company, being minutes of the annual meeting of the board of trustees of the Empire Company, February 4, 1911, adopting the resolution contained in exhibit "185."

Plaintiff's Exhibit No. "187."

Receipt of Walter J. Woods, dated October 19,

1910, to R. G. Belden, for Certificate No. 635, Crown Coal & Coke Company, 8000 shares; certificate No. 430, Michel, for 12,000 shares; and certificate No. 343, for 12,000 shares of Empire; all understood to be personal stock.

Defendants' Exhibits Nos. "188" & "189."

Identified.

Plaintiff's Exhibit No. "190."

Crow's Nest & Northern Railway, per A. E. Wayland, General Manager, to J. D. Hurd, General Manager Crow's Nest Pass Coal Company, August 24, 1908, relative inspecting terminal for railroad, and making arrangements proposed right-of-way.

Plaintiff's Exhibit No. "191."

Letter September 9, 1908, between same parties as exhibit No. 190," stating the price asked for right-of-way by Crow's Nest Pass Coal Company was exorbitant, and asking for proposition as to triangular tract described in map.

Defendants' Exhibits Nos. "192" to "224" Inclusive.

Identified.

Plaintiff's Exhibit No. "225."

Nov. 18th, 1910.

Miss Mary K. Moriarty,
34 Perry St.,
New York, N. Y.

My dear Miss Moriarty:

In your recent letter you mentioned the fact that

the Bank of Montreal stated that there was ten miles of railroad to be constructed. This is true. We thought that you understood this condition.

As a matter of fact, the Crown Coal & Coke Company would be shipping today were it not for the building of this spur. There is no question as to the vast deposits of coal opened up, as they have already been estimated by prominent engineers at 90,000,000 tons.

The only question is the railroad and we have secured the charter for same, have completed our surveys, which have been approved by the Government; have acquired the right of way, cleared a portion of same, and have several thousand ties on hand. The object of selling the present stock is for the building of this spur and we are to commence work on this early next spring and rush it through to completion. We feel that there is absolutely no doubt in regard to being able to finance it as it will only require two months more of such sales as the last two months have had to give us sufficient capital for this work. Sales through the month of September amounted to \$61,000. Through the month of October, \$58,000, and this record has been kept up for the first half of this month, so that you see that we have demonstrated that it is thoroughly practical to raise the money necessary for his work. * * * * *

It is a fact that I fully believe in my own mind,

without a question of doubt, that the stock of the Crown Coal & Coke Co. will, in a few years after operation, reach a value in excess of \$5 per share. You certainly know, Miss Moriarty, that I would not make these representations to you unless I fully believed them. Our sales are so extensive that you certainly appreciate that for the small amount your friend would invest, it would not appeal to me from that standpoint, but it is rather from the standpoint of your being the cause of their making an investment which will reap them handsome benefits. * *

Very truly yours,

RCB-RC

Plaintiff's Exhibit No. "226."

Translation cablegram Butterfield Paris to Crown to effect at a discount of 20% to make contract for sale \$1,000,000.00 first mortgage 5% loans.

Defendants' Exhibit No. "227."

Paper signed by R. G. Belden to bookkeepers: "Important. Do not make an entry on our books showing Bryan got a commission, pass this all under Faires' account as it would not do to have these parties ever get wise. Don't even let his name show in Faires' account, as Faires stands this and it is not necessary."

Plaintiff's Exhibit No. "228."

Letter, July 15, 1909, International Development Company, per R. G. Belden, to C. A. Bryan, relative

his commissions, and that entries were made in books so as relationship with office did not appear, and the closest investigation would not reveal that Faires paid him any commission.

Plaintiff's Exhibit No. "229."

Letter, July —, 1909, C. A. Bryan to R. G. Belden, relative to Hopson stating he was getting a commission and he did not want them to find out he was.

Plaintiff's Exhibit No. "230."

Note, R. G. Belden, undated, to Miss C— (Covington): "Note proxy. Some signed the same ones. These are good. All proxies should be dated, you can do this. If any are for the wrong company scratch and write name also. Where I have changed company name, change date. Had meeting and all OK, and officers as I had them planned."

Plaintiff's Exhibit No. "231."

Letter, January 19, 1911, R. G. Belden to John Neiderer. "We are very much rushed on account of the meeting today, but wish to notify you that you have been elected on the advisory board of trustees of the Empire Coal & Coke Company. I took this responsibility upon myself, feeling that you would accept, without your consent.

Plaintiff's Exhibit No. "232."

Letter September 29, 1909, R. G. Belden, to C. A. Bryan. "You can make a definite statement now

that the tunnel will be started at once. We have engaged a very competent man, and he is on his way from Montana to take charge of this work.

* * * The work on the railroad right-of-way will be commenced at once also. The men are already at the mine for this work."

Plaintiff's Exhibit No. "233."

Letter, R. G. Belden, per R. C., to C. A. Bryan, January 7, 1910. "We do not feel Bryan, that it is advisable for you to sell your stock at the present time, and besides that, there is movement on foot from some of the eastern stockholders to secure the control. * * * Everything seems to be awaiting further developments. We have satisfied ourselves conclusively however, that we have the full voting control and there is no uneasiness on our part in regard to their action.

Plaintiff's Exhibit No. "234."

Letter, International Development Company, per R. G. Belden, to C. A. Bryan, December 2nd, 1909, relative to Chicago firm financing Crown Coal & Coke and railway corporation, and contains the following paragraph:

"The terms of the contract still leave us in control of both the Crown property and the railroad, so that there can be no weak point which any investor should fear."

Plaintiff's Exhibit No. "235."

Letter, November 3rd, '06, R. G. Belden to F. L. Farrel, relative sale by Farrel of treasury stock of the Crown; survey for the railroad; pooling of Syndicate stock; and contains the following:

"Paragraph of the same chapter reads as follows: 'Every person holding a prospecting license may be the timber and stone on the land included in such license for the purpose of his mining operation, and for erection of buildings, on said land, but not further and otherwise.'"

Plaintiff's Exhibit No. "236."

International Development Company, per R. G. Belden, letter January 31st, to G. W. Bush. The letter contains the following:

"For a special inducement to you on trades, I now can handle land with Michel stock, but try to get as good stuff as you can, and if it requires a little sweetening with Crown you may do so. I have 50,000 shares of this stock available for trades. Try to select as clean stuff as you can, and crowd it. I shall be liberal in the commission end.

I am very anxious that you make the next few weeks count especially heavy in your field. I am sending a telegram to "Father" at this time, instructing that no more sales are to be made except on Crown for \$1.00, Empire 50c, and a limited amount of Michel still at 35c. This will give you an opportunity to push the stock at this time."

Plaintiff's Exhibit No. "237."

Letter, February 14, 1911, R. G. Belden to G. W. Bush. "I am going to write to "Father" this morning and tell him to join you for a few days before seeing Mr. Dalziel. Try to have things lined up as best you can for me, and bear in mind that I have 50,000 shares of Michel stock which is available for trade. They should be unincumbered as much as possible and consist of either revenue property or good farm land. You can also use 25,000 shares of Crown in the same manner but be sure to mix in considerable Michel along with it."

Plaintiff's Exhibit No. "238."

Letter, September 18, 1909, R. G. Belden to C. A. Bryan about selling stock at Freewater and the way in which to handle the farmers, and contains the following: "I think I demonstrated to you while I was there that the farmers of that locality do not object to you speaking frankly, and almost forcing them into an investment. They think that it is simply your enthusiasm and determination to make a success of your property. Therefore, they feel all the more inclined to invest. There is always the advantage of two rather than one in selling and that is this, that your will power overcomes the will power of the one man to whom you are selling."

Plaintiff's Exhibit No. "239."

Letter, March 16th, 1910, R. G. B. to C. A. Bryan. "Received a letter from Johnny Gorton,

of Payette, speaking as tho there was business there for us. I do not want you to mention, however, the fact that my trips down there will be in connection with stock."

Plaitniff's Exhibit No. "240."

Letter, May 4, 1910, R. G. Belden to C. A. Bryan, instructions to agent how to make sales.

Plaintiff's Exhibit No. "241."

Copy letter January 10, 1910, to F. L. Dimick: "Just had a letter from some of the stockholders of the Empire and they say that they think they will send two men up after the meeting, so it is possible that they may go up about the 21st or 22nd. After they inspect the property we will ask you to cut your force down to a reasonable basis and will let you know how much per month we can figure on expending there, so that you will be able to figure this out practically. Until that time keep on your full force."

Plaintiff's Exhibit No. "242."

Letter, June 14, 1910, International Development Company, per R. G. Belden to A. M. Bagley, letter written at the request of Mr. Faires, containing information about the Empire Coal & Coke Company. Among others the following: "The Empire property as you will note by book of enclosed, consists of 1240 acres, and has many advantages, such as railroad rates, a very high quality of coal, and

numerous veins. Also an abundance of fine timber and water power."

Plaintiff's Exhibit No. "243."

Letter, March 9, undated, Inland Surety Company, per A. E. W. Circular letter marked "Dict. I.S.C.-E.M." "We are enclosing you a clipping from a recent issue of the Spokane Chronicle, reporting the annual meeting of the stockholders of the Michel Coal Mines, Limited.

If you have not already talked with Mr. Northrup in regard to this proposition we urge you to do so, as only a small block of stock is now offered at 10c per share.

We advise you to secure a block at this offer, as the stock is sure to double in value several times when the company begins uncovering enormous veins of coal which underlie its property." The newspaper clipping enclosed is as follows:

**"STRUCK VEIN OF COAL ACCIDENTLY
DISCOVERED ON THE PROPERTY
OF MICHEL COMPANY.**

The Inland Surety Company, agents of the Michel Coal Mines, Ltd., with properties adjoining on the north the Crows Nest property, in the east Kootenay district, have received a letter stating that a twenty foot vein of Bituminous coal which the company attempted to locate some time ago, was accidentally discovered by a timber cruiser, by the name of

Baptice Lamareaux, while cruising on the Michel property. Lamareaux was formerly employed by the company as prospector, and spent much time looking for the vein which has just been found. Lamareaux was also formerly employed by the Canadian Pacific to do prospecting work in this vicinity.

The Michel property consists of 1280 acres on which coal has been found exposed in a number of places. The company will begin operations this spring as soon as the snow clears off which will probably be about the 1st of May. It is the intention to put five or six men to work opening the veins as a preliminary for more expensive development. A spur from the Canadian Pacific, which has been surveyed to the McDennis property adjoining the Michel property on the west, will pass through its property, and thus give transportation facilities as soon as development work has reached the stage where it will be required."

Plaintiff's Exhibit No. "244."

Letter, January 21st, 1911, International Development Company, per A. E. Wayland, to S. Simard. "In addition to the formal notices herewith enclosed, we wish to suggest that in your trustees' meeting you carry out as nearly as possible, the general wishes of the stockholders, in reference to your election of officers.

The stockholders have generally expressed them-

selves as wanting David Still to take the position of president, and general manager, you as vice president; C. A. Bryan, treasurer; and R. Covington, secretary."

Plaintiff's Exhibit No. "245."

Copy of letter May 20th, 1910, to R. G. Belden, marked "AEW-B." The last paragraph is as follows: "Notwithstanding these problems and surmises, let us sell coal stock—Crown, Michel, Mills or any other kind, but above all—Empire."

DEFENDANTS' EXHIBITS, BEGINNING
AT "151."

Defendants' Exhibit No. "151."

Carbon copy letter, R. G. Belden to Luke Faires, Payette, July 1st, 1909, which contains among statements relative to commission, the following:

"You will be able to deliver one share of railroad for every five hundred dollars invested, and do not misrepresent it by saying thta you are selling treasury stock."

Defendants' Exhibit No. "153."

Letter, July 23rd, 1909, Luke Faires from International Development Company, per R. G. B., instructing him as agent to explain how coal titles are handled in British Columbia, and contains the following:

"We insist on our proposition being put plainly

to the people. I know your method well enough to know that it is not your intention to misrepresent, at the same time that does not relieve the seriousness."

Defendants' Exhibit No. "154."

Letter, copy, International Development Company, per R. G. B., to Luke Faires, July 22nd, 1909, and contains the following: "In my previous letters I warned you as well as I did when I was in Freewater, not to make such a statement as this, 'The money goes to the Government.' Your statements in Freewater have lead those people to the wrong understanding in regard to our title. * * We think too much of our business to allow such statements go uncorrected, and while I know you did not make them with any intentions, yet carelessness does not excuse anything of this kind. In working for the International Development Company you must bear in mind that we are at all times trying to build up our business, and this can be done only through frank, honest, candid statements in regard to the exact conditions."

Defendants' Exhibit No. "155."

Copy of letter, International Development Company, per R. G. Belden, to Luke Faires, July 23rd, 1909.

"I have some other good news for you, in that I have just received a letter from Bryan, after having made a thorough, plain statement of the

condition of titles up north, and he feels perfectly satisfied so that the worry I had the last few days is now over."

Defendants' Exhibit No. "162." (See Page 47 for Exhibit No. "161.")

Letter, C. A. Bryan to R. G. Belden, July 5th, 1909, relative to directors' meeting and contains the following:

"He (Hopson) said that he was glad to know that we were to be real directors, and not just play directors."

Defendants' Exhibit No. "166."

Letter, C. A. Bryan to International Development Company, September 6, 1909, inquiring if International Development Company hold controlling stock in Empire and other properties.

Defendants' Exhibit No. "167."

R. G. Belden to Bryan, advises that it does not "but would almost control the Empire with the full support of Freewater, and Milton, Oregon. The placing of more treasury stock will effect this. The rest of the stock is very much scattered. We always rely on the support of our stockholders for our own protection. Our management has always been such that we have received their support and we are willing to rely on them. This puts us in the same position as any other stockholder."

Defendants' Exhibit No. "169."

Letter, R. G. Belden to C. A. Bryan, December 30th, 1909, relative work being done on the coal property, and contains the following: "I do not think it advisable to put on any more men as I told you before, Demick has instructions to work all men that he can to advantage, and I do not believe that in order to make a showing that we should throw away company money just for the effect. In keeping our clients' confidence we have got to get the value out of the money expended."

Defendants' Exhibit No. "161."

Circular letter, June 16, '09, sent out by the International Development Company, to all stockholders of the Empire at Milton, Freewater and Walla Walla:

"In regard to development as I stated, the Empire has not been opened up but its value has been demonstrated by the work on the adjoining property—that is, on the west where the Crown property has 14 veins of coal opened up within a short distance of the west side lines of the Empire property."

Defendants' Exhibit No. "172."

Letter, R. G. Belden to C. A. Bryan, March 2nd, 1910, containing the following paragraph:

"Wayland stated that in their discussion he asked F. S. Green, (engineer) what he thot of coal being

on the Empire property. Green replied, 'Any damned fool would know there was coal there.' Wayland asked the question in this way simply to draw him out."

Defendants' Exhibit No. "179."

Letter, John S. Vinson, President, to R. Covington, Secretary, Empire, and part of the cross examination of witness John S. Vinson, contained the following:

"I hope that conditions will soon be such that none of the stocks of our valley will go begging on the market. The striking of coal on the Empire, or the floating of the R. R. Bonds would put our certificates near par."

Defendants' Exhibit No. "180."

Letter June 3rd, 1910, President to Secretary, Empire Coal & Coke, contains the following:

"Many of our stockholders would feel greatly relieved if coal was found in the Michel or Empire, and it seems to me that the Michel tunnel is very near the coal vein and we should drive it as fast as possible."

Defendants' Exhibit No. "181."

John S. Vinson, to R. G. Belden. Letter, January 15, 1913. "I sincerely hope that you have succeeded at last in financing the coal property and hope we are through with our troubles in that line. I have

talked with a number of Empire men, all expressed their willingness to contribute the one mill per share if they felt that there was any certainty of development of the camp in the near future."

Defendants' Exhibit No. "184."

Leo R. Niederer, to Defendant Belden. Letter "I regret to say that the post office inspector with an order from Spokane came here and demanded all letters and envelopes sent to my father from you and the company during the last two or three years, asking for one in particular dated on the 18th of January, 1911. Although we could not help it we did not like to do this as it may be working against our own interests for we cannot believe that you have misled us, so until it has been proven to us that you have not been working for our interests as well as your own, we remain, as ever, yours very truly, Leo R. Niederer. P. S. Would you mind telling us who is making all of this trouble?"

Defendants' Exhibit No. "192."

Circular letter, D. J. Kirk, dated August 17, 1910, at Walla Walla, to the stockholders of the Empire Coal & Coke Company, describing his trip over the property at the request of the International Development Company, and has this paragraph: "We believe that the stockholder investing at 25c per share in Empire stock is getting the value of his money in the timber alone, etc.

I have given the names of those who accompanied me on the trip as this will give the stockholders a chance to take up correspondence with any of the men and verify the statements made above. (The statement contains over four closely written pages.)

Defendants' Exhibits Nos. "187," "188" & "193."

Are receipts of persons who claimed defendant Belden represented he was selling them treasury stock, the money to be used for development when each of the receipts contains the statement that the person signing it knew he was purchasing personal stock.

Defendants' Exhibit No. "219."

The officers and directors of the Michel, Crown Coal & Coke, Crows Nest & Northern Railway, and Empire Coal & Coke Company, from the organization of each of said companies to the present time is as follows:

MICHEL COAL MINES, LIMITED.

PRESIDENT:

J. H. Hemphill, R. G. Belden, C. L. Butterfield and H. T. French.

VICE-PRESIDENT:

T. S. Byrne, William Hart, C. L. Butterfield, R. G. Belden, A. B. Williard, A. E. Wayland.

SECRETARY:

J. T. Penn, A. E. Wayland, R. Covington.

TREASURER:

J. T. Penn, A. E. Wayland, A. B. Williard.

DIRECTORS:

1905—R. G. Belden, J. H. Hemphill, J. T. Penn, P. S. Byrne, C. L. Butterfield.

1906—William Hart, Belden, Hemphill, Penn and Butterfield.

1907—J. C. Northrup, A. B. Williard, T. J. Demorest, Hemphill, Penn, Butterfield and Hart.

1908—L. Alboucq, R. G. Belden, A. E. Wayland, Hemphill, Butterfield, Hart and Williard.

1909—T. J. Demorest, and all of 1908 directors re-elected.

1910—P. Kane, D. J. Kirk, C. K. Weismann, Butterfield, Williard, Alboucq, and Wayland.

1911—T. J. Demorest, David Still, Butterfield, Williard, Alboucq, Wayland, and Weismann.

1912—E. C. Moys, S. Simard, J. F. Higginbotham, H. D. French, Williard, Wayland and Weismann.

1913—C. A. Bryan, D. J. Kirk, C. Cooper, J. S. Vinson, Williard, Weismann and Simard.

CROWN COAL & COKE COMPANY.

PRESIDENT:

Frank L. Farrel; C. L. Butterfield, and R. G. Belden.

VICE-PRESIDENT:

R. G. Belden, F. L. Farrel, J. Grier Long, A. Hopson, C. K. Weismann, A. E. Wayland.

SECRETARY:

H. McKerr-Kastan, A. E. Wayland, C. L. Hower, E. C. S. Brainerd.

TREASURER:

J. H. Hemphill, A. E. Wayland, A. Hopson, C. K. Weismann.

GENERAL MANAGER:

R. G. Belden.

MANAGING ENGINEER:

C. L. Hower.

TRUSTEES:

1906—Smith, Farrel, Ballantine, Tolles, Butterfield, Nevin, Gerwig, Belden, Anderson, McKerr-Kastan.

1907—Kerr, Smith, Farrel, Ballantine, Butterfield, Nevin, Gerwig, Belden, McKerr-Kastan.

1908—R. S. Butterfield, Barnes, Mason, Wayland, Hemphill, Belden, Farrel, C. L. Butterfield, Nevin.

1909—Same as 1908.

1910—J. Grier Long, W. F. Palmer, Butterfield, Wayland, and Belden.

1911—A. Hopson, A. Wood, Butterfield, Wayland, and Long.

1912—Hower, Weismann, Belden, Wayland, Hopson, Butterfield, Brainerd.

1913—Elam, Wayland, Weismann, Brainerd, and Butterfield.

CROWS NEST & NORTHERN RAILWAY
COMPANY.

PRESIDENT:

J. Williams, A. Hopson.

VICE-PRESIDENT:

C. L. Butterfield.

SECRETARY-TREASURER:

A. E. Wayland.

DIRECTORS:

1909—Williams, Hemphill, Butterfield, Belden and Wayland.

1910—Bowman, Butterfield, Williams, Belden and Wayland.

1911—Hopson, Hower, Belden, Wayland and Butterfield.

1912—Same as 1911.

EMPIRE COAL & COKE COMPANY

PRESIDENT:

W. J. Graham, J. S. Vinson, David Still, A. E. Wood.

VICE-PRESIDENT:

A. S. Charlton, W. J. Graham, A. Hopson, S. Simard, A. M. Elam.

SECRETARY:

R. Covington, and C. A. Bryan.

GENERAL MANAGER:

E. J. Poteet, A. Hopson.

MANAGING DIRECTOR:

W. F. Sherwood, E. C. S. Brainerd.

TRUSTEES:

1909—A. S. Charlton, R. E. Muir, W. J. Graham (2 years), John Marsh, E. J. Poteet (3 years), Luke Faires, R. G. Belden, C. A. Bryan (2 years), J. S. Vinson, and J. B. Gordon (2 years), A. Overby, R. Covington.

1910—B. J. Kirk, A. Hopson (for other directors see above).

1911—W. F. Sherwood (2 years), David Still, A. M. Elam, S. Simard, W. J. Wood, J. H. Price.

1912—A. J. McCallam, Chas. Cooper, J. McEwen, A. E. Wayland, Sherwood, Elam re-elected.

1913—C. A. Bryan, A. Hopson, E. C. S. Brainerd, J. S. Vinson, J. A. Haydon, C. K. Weismann, Chas. Cooper.

Defendants' Exhibit No. "221."

Letter, May 14, 1908, from Oscar C. Bass, Barrister and Solicitor, Victoria, to R. G. Belden, containing instructions for procuring and surveying right-of-way.

Defendants' Exhibit No. "224."

Copy letter, January 13, 1909, R. G. Belden to Empire Stockholders, referring to report of engineer Gamble on the Crown and contains the following:

"In asking him (Gamble) in the presence of the directors of the Crown Coal & Coke Company as to the relative value of the ground on the side of the valley, on which the Empire Coal & Coke Company's property is situated with that of the Crown Coal & Coke Company, he stated that personally he would be willing to flip a coin as to which side he would prefer. Mr. Gamble was formerly with the Pittsburg Coal & Coke Company. The 1240 acres held by the Empire Coal & Coke Company is densely timbered. The majority of which belongs to the company. The timber is a very good kind and means much for the increasing of the assets of the company."

DEFENDANTS' EXHIBITS "195" TO "218"
INCLUSIVE. FROM MINUTE BOOKS
DIFFERENT CORPORATIONS.

Defendants' Exhibits Nos. "195" & "196."

Pages 18 and 19, minute book, Michel Company. Adjourned first annual stockholders' meeting. The number of trustees were increased to five on motion of R. G. Belden, and the by-laws were amended so that only one trustee was required to be a resident of Spokane.

Defendants' Exhibit No. "197."

Page 27, Michel minute book, meeting of directors August 24, 1907. All the directors present. Engineer directed to make contract for running tunnel. 50,000 shares treasury stock authorized sold and 25c for development.

Defendants' Exhibit No. "198."

Page 28, annual stockholders' meeting, January 20, 1908, of the Michel, 24 stockholders being present. 100,000 shares of treasury stock authorized to be sold at 25c, and directors authorized to fix price, at their discretion.

Defendants' Exhibit No. "199."

Page 50, annual stockholders' meeting of the Michel, January 16, 1911, 15 stockholders being present. Meeting authorized directors to sell whatever stock necessary of the treasury to be used in development.

Defendants' Exhibit No. "200."

Page 53, annual meeting of trustees of the Michel, January 16, 1911. 25,000 shares of treasury stock authorized sold at 35c, and to pay a commission of 20%.

(Empire Minute Book.)

Defendants' Exhibit No. "201."

Page 9, first meeting of stockholders, Empire Company, July 15, 1909, seven present. Treasury stock ordered sold at 25c.

Defendants' Exhibit No. "202."

Annual meeting of the Empire January 20, 1910. International Development Company appointed brokers but not exclusive. Agreed to pool all stock for one year. Motion carried encouraging committee of stockholders to examine books of the company at any time. 25,000 shares of stock authorized sold at 25c, and 50,000 at the discretion of the board of directors.

Defendants' Exhibit No. "208."

Page 38, report LeMaster Cannon & Hay to board of trustees of the Empire, which was spread upon minutes of the company.

Defendants' Exhibit No. "209."

Pages 40-41 & 42, minutes of the board of trustees, relative to the consolidation and mistake of 2,000 feet in the line between the properties of the Crown and Empire and recommending consolidation.

(Crown Minute Book.)

Defendants' Exhibit No. "210."

Pages 9-10-11 & 12, organization meeting, September 11th, 1906. Proposition of R. G. Belden to sell 10 coal locations for \$2,000,000.00, or 1,999,991 shares of stock, and election of trustees.

Defendants' Exhibit No. "214."

Pages 43-3 & 44, adjourned meeting of the stockholders, January 19, 1910. Motion of A. E. Way-

land to have the books and records of the officers audited and experted, and ratifying the action of the trustees in negotiation with Wright and Palmer to place the bonds of the company.

United States of America,

STATE OF WASHINGTON, }
County of Spokane. } ss.

Frank H. Rudkin, Judge of the District Court of the United States for the Eastern District of Washington, Northern Division, and the judge who presided in said court in the trial of the foregoing cause of the United States vs. Russell G. Belden and A. Eugene Wayland, do hereby certify that the matters and proceedings set out in the foregoing Bill of Exceptions consisting of.....pages are matters and proceedings occurring in this cause not already a part of the record therein and that said Bill of Exceptions was filed within the time allowed by law and within the time allowed by order of the Court extending such time and the same are hereby made a part of such record.

I further certify that such amendments as were proposed thereto by the plaintiff have been agreed to by the defendants and the same are hereby made a part of such record.

I further certify that the said Bill of Exceptions contains all of the matters and facts material in the proceedings heretofore occurring in the cause and not already a part of the record therein and that

the same contains all of the facts material in the proceedings as the parties have agreed to the matters therein and that at the time of the signing of this Bill of Exceptions counsel for the respective parties appeared and consented to the signing thereof without notice or application therefor by either party.

Dated this 6th day of October, A. D. 1914.

(Signed) FRANK H. RUDKIN,
Judge.

(Endorsements): Due, legal and timely service of the within proposed amendments to defendants' proposed Bill of Exceptions is admitted this 21st day of September, 1914.

(Signed) FRED MILLER,
Of Defendants' Attorneys.

Bill of Exceptions. Received at the Clerk's office September 21, 1914, and filed in the U. S. District Court for the Eastern District of Washington, after being settled, allowed and certified to by the Court, on the 6th day of October, 1914. W. H. Hare, Clerk.
By Frank C. Nash, Deputy.

*In the District Court of the United States for the
Eastern District of Washington,
Northern Division.*

No. 1881.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

RUSSELL G. BELDEN and
A. EUGENE WAYLAND,

Defendants.

Assignments of Error.

Comes now the defendants, Russell G. Belden and A. Eugene Wayland, jointly and severally, and in connection with the defendants' writ of error and appeal herein, and makes the following assignments of error, which defendants, and each of them, aver occurred upon the trial in this cause:

1.

The court erred in overruling each of the separate demurrers of the defendants herein as to the first count, for the reason that said first count failed to set forth facts sufficient to constitute a crime under Section 5480 of the Revised Statutes of the United States of America as amended.

2.

The court erred in overruling each of the separate demurrers of the defendants herein as to the second count, for the reason that said second count failed

to set forth facts sufficient to constitute a crime under Section 5480 of the Revised Statutes of the United States of America as amended.

3.

The court erred in denying the motion of these defendants and each of them, for a separate trial and in requiring defendants to go to trial together.

4.

The court erred in admitting in evidence the agreement between J. H. Hemphill, Russell G. Belden and S. W. O'Brien forming Inland Surety Company. (Ex. 7.)

5.

The court erred in overruling objection to the testimony of G. W. Jones as to conversations had by him with the defendant Russell G. Belden, and particularly in permitting the said witness to testify as to what defendant Belden stated with reference to a big strata of coal having been found on the Michel claims. (p. 40.)

6.

The court erred in overruling objections to the testimony of R. W. Lloyd and permitting said witness to testify as to a conversation with the defendant Wayland to the effect that the lots traded by the witness for Michel stock were to be used for the purpose of developing the Michel coal properties. (p. 44.)

7.

The court erred in overruling objection to the testimony of the witness House and permitting said witness to testify as to the amount of the personal stock in the Michel Company owned by defendants or International Development Company which had been sold. (p. 56.)

8.

The court erred in overruling objections and permitting the witness House to testify as to the amount received from the sale of treasury stock in the Michel Company and the amount received from sale of the personal stock of defendants or International Development Company prior to January 1, 1912. (p. 56.)

9.

The court erred in overruling the objection of defendants to the testimony of the witness House and permitting the witness to testify as to the amount of treasury stock of the Crown Company which had been sold and the amount received therefor, and as to the amount of personal stock of defendants or International Development Company sold and the amount received therefor. (p. 92.)

10.

The court erred in overruling objection of defendants as to the evidence of the witness House and permitting the witness to testify as to the number of shares of Railway Trust stock sold and the amount realized therefrom. (p. 108.)

11.

The court erred in overruling objection of defendants to the evidence of the witness House and in permitting the witness to testify as to the amount realized by International Development Company from the sale of Railway Trust stock. (—.)

12.

The court erred in admitting in evidence over defendants' objections, prospectus of Michel Coal Mines Limited, being Exhibit 31.

13.

The court erred in overruling the objection of defendants to the testimony of the witness House and permitting the witness to testify as to the number of shares of Railway stock purchased by the Empire Company and the amount realized therefrom and the amount thereof which was appropriated or used by International Development Company. (pp. 108-112.)

14.

The court erred in overruling objection of defendants to the evidence of the witness House and permitting said witness to testify as to the number of shares of treasury stock of Empire Company which was sold and the amount realized therefrom, and the amount of personal stock of the defendants, or International Development Company which was sold and the amount realized therefrom. (p. 109.)

15.

The court erred in overruling the objection of defendants to the testimony of W. C. Hopson and permitting the said witness to testify to the effect that the defendant Belden had represented to him that one share of Railway stock was to be given with each Five Hundred Dollar purchase of Empire stock, and that the money was to be used for the construction of the railway and developing the mining property. (p. 115.)

16.

The court erred in overruling the objection to the evidence of the witness House and permitting said witness to testify to the effect that the W. C. Hopson purchases were taken from the holdings of International Development Company and the money was received by said company, and that the money realized from the Railway stock went to the International Development Company. (p. 119.)

17.

The court erred in overruling the objection to the evidence of the witness John Neiderer and permitting said witness to testify that the defendant Belden said that he came to the said witness for the purpose of raising money for the railroad. (p. 125.)

18.

The court erred in admitting in evidence purported letter of January 18, 1911, purporting to have been written to said John Neiderer. (Ex. 183.)

19.

The court erred in overruling objection of defendants to the evidence of the witness Walter J. Woods and permitting said witness to testify that defendants had stated that the money realized from the sales of stock made to said Woods would be used to develop the mining properties, and that notes received from said Woods would be used for the same purpose. (p. 129.)

20.

The court erred in admitting in evidence over defendants' objections letter of date January 21, 1911, purporting to have been written to said witness, Walter J. Woods. (Ex. 185.)

21.

The court erred in overruling objection of defendants to the evidence of said Walter J. Woods and permitting said witness to testify that the defendant Belden stated that the reason the notes were taken in said Belden's name was that he was an officer of International Development Company and that later the notes would be divided between the different mining companies. (p. 130.)

22.

The court erred in overruling objection of defendants to the evidence of C. A. Bufch and permitting said witness to testify that the defendant Belden told him that the note which the witness

had given for stock was to be used to develop the coal properties. (p. 144.)

23.

The court erred upon the government resting in denying the motion of the defendants, and each of them, for peremptory instructions to the jury to return a verdict in favor of the defendants and each of them as to each of the counts in the indictment, and in refusing to peremptorily instruct the jury at the close of all of the testimony in the case to find each of the defendants not guilty upon each of the counts in the indictment. (p. 165.)

24.

The court erred throughout the trial in permitting the government to introduce in evidence alleged acts and declarations of the defendant Belden which occurred in the absence of the defendant Wayland and alleged acts and declarations of the defendant Wayland which occurred in the absence of the defendant Belden.

25.

The court erred in instructing the jury on the law relating to conspiracy and the right of one conspirator to bind another by his acts or declarations, for the reason that it was not in issue under the indictment, nor was there any evidence sufficient to establish a conspiracy.

26.

The court erred in instructing the jury concerning

the admission of circumstantial evidence for the purpose of establishing fraud as follows:

"Its admissibility is placed on the ground that where transactions of a similar character, executed by the same parties, are closely connected in point of time, the inference is reasonable that they proceed from the same motive."

27.

The court erred in further instructing the jury as follows:

"The case of fraud as herein stated is among the few exceptions to the general rule that other offenses of the accused are not relevant to establish the main charge."

28.

The court erred in instructing the jury as follows:

"Testimony has been offered here tending to show acts committed or declarations made by each of the defendants and I will now instruct you as to the circumstances under which acts committed or declarations made by one defendant may be used against the other. Ordinarily a person is only amenable to the criminal law for his own acts and his own conduct and not for the acts or conduct of others. There are, however, two well recognized exceptions to this rule; one is where two or more persons form a conspiracy to commit a crime and the other is where one person aids, abets, counsels, commands, induces or procures the commission of a crime by another."

29.

The court erred in instructing the jury as follows:

“A conspiracy is generally defined as a crime of combination between two or more persons to commit some unlawful act or to commit some lawful act by unlawful means.”

30.

The court erred in instructing the jury as follows:

“If you find from the testimony beyond a reasonable doubt that the defendants conspired together to commit the offense charged in the indictment, then the acts of each defendant in furtherance of the common design are in contemplation the acts of both and binding on both.”

31.

The court erred in instructing the jury as follows:

“And if you find from the testimony beyond a reasonable doubt that either defendant aided, abetted, counseled, commanded, induced or procured the commission of the crime charged in the indictment by the other, then both defendants are equally guilty.”

32.

The court erred in instructing the jury as follows:

“But unless you find beyond a reasonable doubt that there was a conspiracy or that one of the defendants aided, abetted, counseled, commanded, induced or procured the commission

of the crime by the other, each defendant is criminally responsible for his own act and his own conduct if guilty at all."

33.

The court erred in refusing to give the following instruction requested by defendants, to-wit:

"You are further instructed that the case upon the part of the government in so far as relates to whether there are, or are not, commercial deposits of coal on the Empire and Michel properties depends upon the opinion of its expert, and in this connection I instruct you that the defendants cannot be convicted upon the opinion of an expert as to whether there is or is not coal upon said properties and your verdict will be not guilty upon both counts in the indictment."

34.

The court erred in refusing to give the following instruction requested by defendants, to-wit:

"You are further instructed that unless you find, beyond a reasonable doubt that both the Michel and Empire properties are worthless as far as containing commercial veins of coal is concerned, your verdict will be not guilty upon both counts in the indictment."

35.

The court erred in refusing to give the following instruction requested by defendants, to-wit:

"You are instructed that the government has failed to introduce any testimony to the effect that the defendants wrote, or caused said letters set out in the first and second counts of the in-

dictment, to be written, or that they mailed, or caused the same to be mailed, and therefore your verdict must be not guilty as to both of said defendants upon both counts in the indictment."

36.

The court erred in refusing to give the following instruction requested by defendants, to-wit:

"You are further instructed that no evidence has been offered to show that the letters set out in the first and second counts were to be given any other or different interpretation than they purport to have upon their face and in considering them you will accord them the interpretation or meaning to which they are entitled by a reading thereof."

37.

The court erred in refusing to give the following instruction requested by defendants, to-wit:

"This is not a prosecution for fraud, but is one for the alleged use of the United States mails for the purpose of executing a scheme or artifice to defraud. If you should find that the defendants had devised or intended to devise any scheme or artifice to defraud in the manner as alleged in the indictment, but that the letters set out in counts 1 and 2 of the indictment were not for the purpose of executing such scheme or artifice, you will find the defendants not guilty, as to such count or counts as the case may be."

38.

The court erred in refusing to give the following instruction requested by defendants, to-wit:

"You are instructed that the letter set out in the first count of the indictment, if you find the same was deposited by the defendants or caused to be deposited in the United States mail was for the purpose only of effecting a sale of treasury stock of the companies mentioned in the letter, then as to that count you will disregard all evidence introduced in this case with reference to any representations it is claimed by the Government were made to any purchasers or prospective purchasers as to sales made as to whether the same was treasury or personal stock and any and all evidence that may have been introduced with reference to the purpose for which the proceeds realized from railroad shares of stock were to be used."

39.

The court erred in refusing to give the following instruction requested by defendants, to-wit:

"You are instructed that the letter set out in the first count has not been explained in any manner and you can give it only the construction which it bears upon its face and that is that it was, if so deposited with Post Office, for the purpose of executing a sale of treasury stock of the companies mentioned to John Neiderer and was not for the purpose of executing any sale of the defendants' personal stock or for the purpose of making any sale of railroad stock."

40.

The court erred in refusing to give the following instruction requested by defendants, to-wit:

"You are instructed as to the second count that the letter therein set forth has not in any

manner been explained and if you find that the same was either placed or caused to be placed by the defendants in the United States Post Office, you can only give the said letter the construction which it bears on its face. That construction is that it was a report of the action of a stockholders' meeting of the Empire Coal & Coke Company. There has been no evidence introduced to the effect that any representation contained in said letter was in any respect false and I charge you that there was nothing improper in defendants depositing it in the mail, if you find that they did so, nor does it establish on its face any intention or purpose of any improper control or manipulation of the said Empire Coal & Coke Company."

41.

The court erred in refusing to give the following instruction requested by defendants, to-wit:

"You are further instructed with reference to the said second count that there is no evidence showing that the same was placed in the United States Post Office, if you find it was so placed by the defendants or caused to be so placed, for the purpose of executing any sales of the defendants' personal stock under any representation that any was treasury stock, nor for the purpose of executing any sale of railroad stock, and in considering said second count you will disregard all evidence introduced bearing upon the question of the sales of any personal stock under any representation that it was treasury and any evidence relating to the sale of railroad stock."

42.

The court erred in refusing to give the following instruction requested by defendants, to-wit:

"You are further instructed that the letter set out in the second count on its face shows that it had nothing to do with the execution of any scheme or artifice to sell any stock or for the purpose of executing any scheme or device misrepresenting the conditions of any of the coal properties and in considering any said count, you will disregard any evidence relating to any representations as to the conditions of the properties or the presence or absence of coal."

43. .

The court erred in refusing to give the following instruction requested by defendants, to-wit:

"If you find from the evidence that the defendants did not misrepresent the facts as to the presence or absence of coal on the property referred to in the indictment, you must find the defendants not guilty since it is on this allegation that the indictment is founded as to both counts."

DANSON, WILLIAMS & DANSON,
ROBERTSON & MILLER,

Attorneys for Defendants.

(Endorsements): Assignments of Error. Filed in the U. S. District Court, Eastern District of Washington, June 19, 1914. Wm. H. Hare, Clerk. Frank C. Nash, Deputy.

*In the District Court of the United States, for the
Eastern District of Washington,
Northern Division.*

No. 1881.

UNITED STATES OF AMERICA,

Plaintiff.

vs.

RUSSELL G. BELDEN and
A. EUGENE WAYLAND,

Defendants.

Petition for Writ of Error.

Now comes Russell G. Belden and A. Eugene Wayland, defendants herein, jointly and severally, and say:

That on or about the 19th day of June, A. D. 1914, this court entered Judgment of Conviction herein on an indictment, in favor of the United States and against the said defendants and each of them, in which judgment and the proceedings had thereunto in this cause certain errors were committed to the prejudice of the said defendants and to each of them, all of which will more in detail appear from the Assignment of Errors which is filed with this Petition.

WHEREFORE, the said defendants Russell G. Belden and A. Eugene Wayland, jointly and severally pray that a Writ of Error may issue in their behalf out of the United States Circuit Court of Appeals in and for the Ninth Judicial Circuit of

the United States, for the correction of errors so complained of, and that a transcript of the record, proceedings and papers in said cause, duly authenticated, may be sent to the Circuit Court of Appeals.

DANSON, WILLIAMS & DANSON,
ROBERTSON & MILLER,

Attorneys for Defendants.

(Endorsements): Petition for Writ of Error.
Filed in the U. S. Dist. Court, Eastern Dist. of
Washington, June 19, 1914. Wm. H. Hare, Clerk.
Frank C. Nash, Deputy.

*In the District Court of the United States, for the
Eastern District of Washington,
Northern Division.*

No. 1881.

UNITED STATES OF AMERICA,

Plaintiff.

vs.

RUSSELL G. BELDEN and
A. EUGENE WAYLAND,

Defendants.

Order Allowing Writ of Error.

On this 19th day of June, 1914, come the defendants above named, Russell G. Belden and A. Eugene Wayland, jointly and severally, by their attorneys, and filed herein and presented to the court a petition praying for the allowance of a Writ of Error and

Assignment of Errors intended to be urged by them and each of them, praying also that a transcript of the record and proceedings and papers upon which the judgment herein was rendered, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Judicial Circuit and that such order and further proceedings may be had as may be proper in the premises.

In consideration whereof the court does allow the Writ of Error upon each of the defendants giving bond according to law in the sum of Three Thousand (\$3000.00) Dollars, which shall operate as a supersedeas bond.

FRANK H. RUDKIN,
United States District Judge.

(Endorsements): Order Allowing Writ of Error.
Filed in the U. S. District Court, Eastern Dist. of
Washington, June 19, 1914. Wm. H. Hare, Clerk.
Frank C. Nash, Deputy.

454 *Russell G. Belden and A. Eugene Wayland vs.*

*In the District Court of the United States, for the
Eastern District of Washington,
Northern Division.*

No. 1881.

UNITED STATES OF AMERICA,

Plaintiff.

VS.

RUSSELL G. BELDEN and
A. EUGENE WAYLAND,

Defendants.

Writ of Error.

(Lodged Copy.)

United States of America,—ss.

The President of the United States of America
to the Judges of the District Court of the United
States, for the Eastern District of Washington,
Northern Division, Greeting:

Because upon the trial in the record and proceedings, and also in the rendition of the judgment of a plea, which is in the said District Court, before you, or some of you, between the United States of America, plaintiff, and Russell G. Belden and A. Eugene Wayland, defendants, a manifest error hath happened, to the great damage of said defendants, and each of them, as by their complaint appears, and it being fit that the error, if any there hath been, should be duly corrected, and full and speedy justice done to the parties, and each of them, aforesaid in this behalf, do hereby command, if judgment

be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals, for the Ninth Circuit, together with this Writ, so that you have the same at the City of San Francisco, in the State of California, within thirty days from the date of this writ, in the said Circuit Court of Appeals, and then and there held, that the records and proceedings aforesaid be inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error what of right and according to the law and custom of the United States should be done.

WITNESS, the Honorable EDWARD D. WHITE, Chief Justice of the Supreme Court of the United States, this 19th day of June, in the year of our Lord 1914, and of the Independence of the United States the one hundred thirty-seventh.

Allowed by: FRANK H. RUDKIN,
Judge.

Attest: W. H. Hare, Clerk U. S. District Court,
Eastern District of Washington, Northern Division.

By FRANK C. NASH,
Deputy Clerk.

(Endorsements): Writ of Error—(Lodged Copy).
Filed in the U. S. District Court Eastern Dist. of
Washington, June 19, 1914. Wm. H. Hare, Clerk.
Frank C. Nash, Deputy.

456 *Russell G. Belden and A. Eugene Wayland vs.*

*In the District Court of the United States, for the
Eastern District of Washington,
Northern Division.*

No. 1881.

UNITED STATES OF AMERICA,

Plaintiff.

vs.

RUSSELL G. BELDEN and
A. EUGENE WAYLAND,

Defendants.

**Acceptance of Service of Petition for Writ of Error,
and Order Allowing Writ of Error, Etc.**

Service accepted and copy received of Petition for Writ of Error, Assignment of Errors, Order Allowing Writ of Error, Order Fixing Amount of Bail Bond, Bail Bond, Order Extending Time for Filing Bill of Exceptions, this 19th day of June, A. D. 1914.

FRANCIS A. GARRECHT,
United States District Attorney.

(Endorsements): Acceptance of Service of Petition for Writ of Error and Order Allowing Writ of Error, etc. Filed in the U. S. District Court, Eastern Dist. of Washington, June 19, 1914. Wm. H. Hare, Clerk. Frank C. Nash, Deputy.

*In the District Court of the United States, for the
Eastern District of Washington,
Northern Division.*

No. 1881.

UNITED STATES OF AMERICA,

Plaintiff.

vs.

RUSSELL G. BELDEN and
A. EUGENE WAYLAND,

Defendants.

Bond on Writ of Error.

KNOW ALL MEN BY THESE PRESENTS,
that we, Russell G. Belden, and A. Eugene Wayland,
as principals, and the Fidelity & Deposit Company
of Maryland, a surety corporation organized and
existing under the laws of the State of Maryland,
as surety, are held and firmly bound unto the United
States of America in the sum of Six Thousand
Dollars (\$6000.00) lawful money of the United
States of America, to be paid the said United States
of America, to which payment well and truly to be
made, we bind ourselves and each of us, jointly and
severally, and our and each of our heirs, executors,
administrators and representatives, firmly by these
presents.

Sealed with our seals and dated this 19th day of
June, 1914.

WHEREAS, the above bounden principals have

each prosecuted a writ of error to the Circuit Court of Appeals for the Ninth Judicial Circuit, to reverse the judgment and grant each of said principals a new trial in the above entitled action by the District Court of the United States for the Eastern District of Washington, Northern Division, and the bail and supersedeas bond of each of the defendants has been fixed by the said District Court in the sum of Three Thousand Dollars (\$3000.00).

NOW, THEREFORE, the condition of this obligation is such that if the above named principals shall each prosecute his said writ of error to effect and surrender his body unto the said Court, if he shall fail to make good his plea, then this obligation shall be void, otherwise to remain in full force and effect in the sum of Three Thousand Dollars (\$3000.00) as to each of the defendants.

RUSSELL G. BELDEN. (Seal)

A. EUGENE WAYLAND. (Seal)

(Seal)

FIDELITY & DEPOSIT COMPANY
OF MARYLAND,

By JAS. A. WILLIAMS,
Its Attorney in Fact.

Attest: W. L. BERRY, General Agents.

Approved June 19, 1914.

FRANK H. RUDKIN,
Judge.

(Endorsements): Bond on Writ of Error. Filed in the U. S. District Court, Eastern District of Washington, June 19, 1914. W. H. Hare, Clerk. Frank C. Nash, Deputy.

In the United States Circuit Court of Appeals for the Ninth District.

No. 1881.

UNITED STATES OF AMERICA,

Plaintiff.

vs.

RUSSELL G. BELDEN and
A. EUGENE WAYLAND,

Defendants.

Citation.

(Lodged Copy.)

The President of the United States to the above named plaintiff and to F. H. Garrecht, attorney for plaintiff:

You are hereby cited and admonished to be and appear at the United States Circuit Court of Appeals for the Ninth Circuit to be held in the City of San Francisco, in the State of California, within thirty days from the date of this writ, pursuant to a writ of error filed in the Clerk's office of the United States District Court for the Eastern District of Washington, Northern Division, wherein Russell G. Belden and A. Eugene Wayland are

the plaintiffs in error, and you are the defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done the parties in that behalf.

WITNESS, the Hon. EDWARD D. WHITE, Chief Justice of the Supreme Court of the United States, this 7th day of October, A. D. 1914, and of the Independence of the United States the one hundred and thirty-ninth.

(Signed) FRANK H. RUDKIN,
Judge.

Attest: W. H. HARE, Clerk.

(Endorsements): Citation—(Lodged Copy). Filed October 6, 1914. W. H. Hare, Clerk.

*In the District Court of the United States, Eastern
District of Washington, Northern Division.*

No. 1881.

UNITED STATES OF AMERICA,
Plaintiff.

vs.

RUSSELL G. BÊLDEN and
A. EUGENE WAYLAND,
Defendants.

Order to Transmit With Original Exhibits.

Upon the agreement of the parties in open court, it is hereby

ORDERED that the exhibits filed in the trial of the above-entitled cause in the United States District Court, on such of them as either party may designate, be by the clerk of said court transmitted with the transcript on appeal to the United States Circuit Court of Appeals at San Francisco.

Done in open Court this 21st day of September, A. D. 1914.

(Signed) FRANK H. RUDKIN,
Judge.

(Endorsements): Order to Transmit with Record Original Exhibits. Filed October 6, 1914. W. H. Hare, Clerk. By Frank C. Nash, Deputy.

*In the United States Circuit Court of Appeals
Ninth District.*

UNITED STATES OF AMERICA,
Defendant in Error,
vs.

RUSSELL G. BELDEN and
A. EUGENE WAYLAND,
Plaintiffs in Error.

Order

This cause coming to be heard on motion of the Plaintiffs in Error for an order extending the time in addition to the time heretofore granted for filing the printed record in the office of the Clerk of the Circuit Court of Appeals, and the respective parties agreeing

thereto, and the court being fully advised in the premises,

WHEREFORE: It is CONSIDERED, ORDERED and ADJUDGED by the Court that the thirty (30) days allowed for filing the printed record in the office of the Clerk of the Circuit Court of Appeals from the date of the certifying of the Bill of Exceptions is hereby extended fifteen (15) days so that Plaintiffs in Error will have fifteen (15) days additional in which to file said printed record.

Done in open court this 14th day of October, A. D. 1914.

(Signed) FRANK H. RUDKIN,
Judge.

(Endorsements): Order extending time to file
Printed Record. Filed November....., 1914.

Clerk U. S. Circuit Court of Appeals.

*In the District Court of the United States, Eastern
District of Washington, Northern Division.*

No. 1881.

UNITED STATES OF AMERICA,

Plaintiff.

vs.

RUSSELL G. BELDEN and
A. EUGENE WAYLAND,

Defendants.

Praeceptum for Transcript of Record.

To the Clerk of the above-entitled Court:

You will please prepare and send to the clerk of the Circuit Court of Appeals the following records, to-wit:

Indictment; Demurrer of both defendants; order overruling demurrers; motion for separate trials and affidavit; order denying motion for separate trials; plea and arraignment; verdicts; motion for new trial; order denying motion for new trial; motion in arrest of judgment; order denying motion in arrest of judgment; sentence; order extending time May, 1914; same, June, 1914 (2); same August 17, 1914; same for filing Printed Record; Bill of Exceptions; Petition for Writ of Error; order allowing Writ of Error; Assignment of Errors; Writ of Error; Bond on Writ of Error; Citation; order to transmit

464 *Russell G. Belden and A. Eugene Wayland vs.*

original exhibits; Acceptance of Service and
Praeipie for Transcript of Record.

(Signed) ROBERTSON & MILLER,
Attorneys for Defendants.

(Endorsements): Praeipie for Transcript of
Record. Filed October 9, 1914. W. H. Hare, Clerk.

*In the District Court of the United States, Eastern
District of Washington, Northern Division.*

No. 1881.

UNITED STATES OF AMERICA,

Plaintiff.

vs.

RUSSELL G. BELDEN and
A. EUGENE WAYLAND,

Defendants.

Clerk's Certificate to Transcript of Record.

United States of America, }
Eastern District of Washington, } ss.

I, W. H. Hare, Clerk of the District Court of
the United States for the Eastern District of Wash-
ington, do hereby certify the foregoing printed pages,
numbered from 1 to 464, inclusive, to be a full,
true, correct and complete copy of so much of the
record, papers, bill of exceptions, exhibits, testimony
and other proceedings in the above and foregoing

entitled cause, as called for in defendants' praecipe for a transcript of the record herein, which praecipe will be found on page 464 of this record, as the same remain of record and on file in the office of the Clerk of said District Court, and that the same constitute my return to the annexed writ of error lodged and filed in my office on the 19th day of June, 1914.

I further certify that I hereto attach and herewith transmit the Original Citation issued in said cause.

I further certify that the cost of preparing, certifying and printing the foregoing transcript is the sum of \$371.90, and that the said sum has been paid to me by Messrs. Robertson & Miller, attorneys for defendants and plaintiffs in error.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said District Court, at Spokane, in the Eastern District of Washington, in the Ninth Judicial Circuit, this 3rd day of November, 1914, and in the Independence of the United States of America, the one hundred and thirty-ninth.

(Signed) W. H. HARE,
Clerk.

(Seal)

United States
Circuit Court of Appeals
 FOR THE NINTH CIRCUIT

RUSSELL G. BELDEN and
 A. EUGENE WAYLAND,
Plaintiffs in Error,

vs.

THE UNITED STATES OF
 AMERICA,
Defendant in Error.

*Upon Writ of Error to the United States District
 Court for the Eastern District of Washington,
 Northern Division.*

BRIEF OF PLAINTIFF IN ERROR,
 RUSSELL G. BELDEN.

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STATEMENT OF THE CASE.

Russell G. Belden and A. Eugene Wayland were both found guilty by the jury and sentenced. Since obtaining the Writ of Error A. Eugene Wayland arranged with the District Attorney to begin the service of his sentence and to waive his appeal. This brief is in behalf of the Plaintiff in Error Belden.

An indictment with three counts was returned against both Belden and Wayland. The first count charged them with having, prior to the 18th day of January, 1911, devised and intending to devise a scheme and artifice to defraud one John Neiderer and divers persons, being all such persons from whom they would, or might, obtain money or property by means of said scheme and artifice and divers false and fraudulent schemes, representations and promises, and persons with whom said defendants might, or could get into communication through the United States mails, which scheme and artifice to defraud was to be effected by the use and misuse of the United States Post Office Establishment, intending to incite and induce such persons so intended to be defrauded by means of printed circulars, letters and reports distributed through the mail. The indictment further charged them with having organized the International Development Company, which was controlled and managed by defendants, which was to be the fiscal agent of other companies thereafter to be organized and controlled by defendants. That through the International Development Company the defendants procured certain alleged coal claims in British Columbia, having little or no value, and organized a corporation named Michel Coal Mines, Limited, with a capital stock of 1,500,000 shares, par value \$1.00 each, and in consideration for defendants conveying to the corporation the coal claims, the corporation would

issue to them as paid up a large majority of the capital stock; and also caused the formaton of two other corporations following the same general scheme, named respectively, Crown Coal & Coke and Empire Coal & Coke. Further, that they caused to be incorporated a company known as Crows Nest & Northern Railway Company for the purpose of taking over a charter they obtained from the Canadian Government, for a large percentage of the capital stock fully paid up, the balance of the stock not issued in their name, or in the name of the International Development Company was designated as treasury stock. It was further charged defendants would, by stock manipulation, and other means, control all of the corporations. It was further charged that defendants, in various ways, sold the stock of the various companies, representing it was of great value, when as a matter of fact the only corporation which had valuable coal claims was the Crown and they sweetened other sales with Crown stock, and sold Railroad stock representing that the money was to be used in constructing a railway, when it had not acquired any right-of-way. Further that with every \$500.00 purchase of stock in the Empire one share of railway stock was given purchasers with the understanding \$100.00 was to be used to equip the railroad, and the defendants used the money for their own benefit; that it was represented by the defendants that the stock they were selling or offering for sale, was

treasury stock to be used for development of the mining properties when in fact they were selling their own personal stock. That for the purpose of executing said scheme they sent the letter to John Neiderer set out in first count (p. 13).

Second count is like unto the first only the letter was addressed to Walter J. Woods.

Upon the third count the Court directed a verdict of not guilty.

The defendants severally demurred to the indictments and to each count thereof, assigning, among other grounds, that it did not state any crime against either of the defendants, all of which were overruled.

The defendants thereupon each moved the Court for separate trials supported by their affidavits.

The trial resulted as aforesaid. The defendants each filed their motions for a new trial and in arrest of judgment, both of which were overruled by the court and Plaintiff in Error sentenced to serve a year and a day at McNeil's Island.

THE EVIDENCE.

Belden and Wayland were young men at the time they first engaged in the real estate business in the City of Spokane under the name of the

R. G. Belden Company. It was first a partnership and was later incorporated. About a year afterwards the International Development Company was organized and the first promotion attempted was an irrigation enterprise (p. 263 and subsequent). Prior to the organization of this company defendants had an option on what was known as the McGuire claims. An investigation induced defendants to drop them and to become interested in the Crows Nest coal fields, which are now the most extensive in the Northwest.

The Michel was the first corporation organized. Its articles were executed in November, 1905 (p 360). It started with two coal claims. Mr. Gamble, a coal expert, investigated the ground and pronounced it good coal land or ground.

The next corporation organized was the Crown Coal & Coke Company (Plaintiff's Ex. 89, p. 384). The articles were executed August 25, 1906, nearly a year after the Michel. It started with ten coal claims (Plaintiff's Exhibit 103, p 385).

The next company organized was the Empire Coal & Coke Company (Plaintiff's Exhibit 141, p. 401), seven trustees, and Wayland was not on the board. It started with 1240 acres of coal land.

These coal claims were situated in a country where transportation was an important item and for that purpose the Crows Nest & Northern Railroad Company was organized (Plaintiff's Exhibit

102, p. 385) with five trustees. It is admitted by the Government that the Crown Company's property has valuable coal deposits (p. 143, testimony witness Thomas). He testified he examined the Michel and Empire and found them barren, but made no report to either Belden or Wayland, but did to their engineer Mr. Hower (p. 143).

Mr. Gamble, the engineer who experted the properties for the defendants, testified (p. 290 et. seq.) that he had advised the defendants the same veins of coal existed on the Michel that were found under the McInnis property. He also advised the defendants to acquire the Empire property (p. 292).

The business of their corporations was carried on practically the same as all other corporations organized for the purpose of developing the natural resources of the country. The only assets were the coal prospects or ground. Each corporation had from three to seven directors, and some even more. They were largely capitalized it is true, but in this they were not unlike other development corporations. There is not one line of testimony in the entire record that defendants did not always believe that their claims contained immense bodies of coal. There is not a line of testimony to the effect that they manipulated the shares in such a way as to give them the control. It is true they usually had the larger number of shares, but that is because they had the coal locations to sell to the various corporations. They never in any way schemed to get hold

of the coal locations, but acquired them in the usual way neither did they do any of the things charged in the indictments. It is charged they sold personal stock, representing it as treasury. In nearly every instance where this claim is made they were able to disprove the charge with written receipts. There is some testimony relative to misrepresentations, etc., but it is denied, and a great many cases clearly disproved. Here were four different corporations in which were interested a great many different people and as they lost what they invested it is not to be wondered at that a great many got sore, for as a general thing the public is a hard loser.

ASSIGNMENT I.

The court erred in overruling the demurrer of defendant Belden to each of the counts in the indictment (p. 43).

ASSIGNMENT II.

The court erred in denying the defendant Belden's motion for a separate trial (p. 55).

ASSIGNMENT III.

The court erred in admitting in evidence Plaintiff's Exhibit 7 (p. 358).

ASSIGNMENT IV.

The court erred in admitting in evidence Plaintiff's Exhibits 8 and 9.

ASSIGNMENT V.

The court erred in overruling defendant's objection to the evidence of witness House and in permitting him to testify as to the number of Railway Trust stock sold and amount realized therefrom (p. 165).

ASSIGNMENT VI.

The court erred in permitting the witness House to testify as to the number of shares of treasury stock each of the various corporations that was sold by defendants, or International Development Company and the amount realized therefor, and the amount of personal stock in said companies held by said defendants, and the amount realized from the sale thereof. (See this numbered Assignment in the argument.)

ASSIGNMENT VII.

The court erred in admitting in evidence, over defendants' objection letter set out in second count of indictment (Plaintiff's Exhibit 185, p 218).

ASSIGNMENT VIII.

The court erred throughout the trial in permitting the Government to introduce in evidence alleged acts and declarations of the defendant Wayland, which occurred in the absence of the defendant Belden. (See argument this Assignment.)

ASSIGNMENT IX.)

The court erred in overruling motion of defendants and each of them made at the close of all of the evidence to dismiss the charge against each of them for the reason the evidence was insufficient to sustain a conviction against either of them (p. 833).

ASSIGNMENT X.

The court erred in instructing the jury upon the subject of a scheme, design, or artifice for the reason there was not any evidence that the defendants had entered into any scheme design, or artifice to defraud any person as set out in the various counts in the indictment, or at all.

ASSIGNMENT XI.

The court erred in giving to the jury instructions upon the question of conspiracy (p. 339-40-41) for the reason that the indictment did not charge the defendants, or either of them, with having entered into any conspiracy for the purpose of defrauding any person or persons and for the further reason that there was not any evidence introduced for the purpose of establishing any conspiracy and for the further reason no conspiracy was established.

ASSIGNMENT XII.

The court erred in giving to the jury the instruction upon conspiracy, pages 339-40-41, and the whole of said charge or instruction.

ASSIGNMENT XIII.

The court erred in refusing to give to the jury instructions requested by the defendants, Nos. 1, 2, 3, 4, 5 and 6, and each and every one thereof, found on pages 344 and 345.

ASSIGNMENT XIV.

The court erred in refusing to give to the jury defendants' request No. 10 and the whole thereof found on page 346, which would have told the jury that whether commercial deposits of coal are on the Empire and Michel depends upon the opinion of experts, and that defendants could not be convicted upon the opinion of any expert witness as to the nonexistence of coal.

ASSIGNMENT XV.

The court erred in refused to give to the jury requested instruction No. 11 on page 346.

ASSIGNMENT XVI.

The court erred in refusing to give to the jury instructions Nos. 13 and 15, on pages 347 and 348.

ASSIGNMENT XVII.

The court erred in refusing to give to the jury requested instruction No. 17, found on page 348, which would have told the jury that the letters set out in the first count of the indictment referred only to the sale of treasury stock, and that defendants could not be convicted upon said count for

selling personal stock under the representation that it was treasury stock.

ASSIGNMENT XVIII.

The court erred in refusing to give to the jury requested instructions Nos. 18 and 19, found on pages 348 and 349, and each and all thereof.

ASSIGNMENT XIX.

The court erred in refusing to give to the jury requested instructions Nos. 20 and 23, found on pages 349 and 350.

ASSIGNMENT XX.

The court erred in overruling the motion of the defendant Belden for a new trial.

ASSIGNMENT XXI.

The court erred in overruling the motion of defendant Belden in arrest of judgment.

ASSIGNMENT XXII.

The court erred in entering judgment upon the verdict of the jury and in sentencing defendant Belden.

ASSIGNMENTS I. AND XXI.

These two assignments relate to the sufficiency of the indictment and will be considered together.

The scheme as laid in the indictment renders a criminal intent impossible. Section 215 of the Criminal Code provides that "Whoever having de-

vised or intending to devise any scheme or artifice to defraud * * * * * shall for the purpose of executing said scheme, or artifice, or attempting so to do," etc.

The first count in the indictment, as does also the 2nd and 3rd, opens with this language:

"That Russell G. Belden, etc.' on the 18th day of January, A. D. 1911, * * * having theretofore devised and intending to devise a scheme to defraud one John Neiderer, and divers other persons to the grand jury unknown, * * *."

It will be thus seen an attempt is made to jointly charge two defendants in the same indictment without alleging or attempting to charge a conspiracy. It would require all the pleader has alleged to state a crime against one defendant, admitting the other facts set out in the indictment were sufficient.

Two defendants, as the court said in the instructions, could be responsible for the acts of each other only in of two ways. Either that they had formed a conspiracy, or where one aided or abetted the other. Now there is no attempt to charge a conspiracy or confederation. The indictment simply says, "having theretofore devised, or intending to devise," then goes on and sets out the organization and manipulation of the various corporations. One man did not do this alone. Two are charged. The language is "theretofore and intending." This language involves both a recitation and some future act. If a conspiracy had been entered into, they

could not have intended. There is not any charge in the indictment that any of the overt acts set out in the indictment were the result of any conspiracy or that one aided or abetted the other, if such a thing were possible. The importance of this contention at once appears when in the first count of the indictment we find a letter signed by the defendant Belden without any claim that his co-defendant, in any wise, participated in this overt act, and then we turn to the second count and discover that the overt act in that count was the work of Wayland, without any allegation of Belden's connection with it. In each case the letters are the letters of the corporation, signed by the officers who, in these two counts, were the defendants respectively. There is no charge against the corporation or that these letters were the act of the corporation.

The recitation as to how the scheme or devise was effected is merely a recitation of a lot of facts or circumstances without any allegation that they were the result of a conspiracy between the defendants or defendants and other persons. There is no positive allegation anywhere that any of the acts detailed were a part of any scheme, or the result of any conspiracy. Neither is there any allegation that any of said acts occurred in this judicial district, or within the statute of limitations. While the courts are liberal in holding almost any sort of a grand jury report to be an indictment, we cannot see on what theory this document can be so dignified.

The pleader has seen fit to allege that these letters set out in the first and second counts were for the purpose of executing said scheme and artifice and in attempting so to do, when each is perfectly harmless in and of themselves, or in connection with the scheme there alleged.

ASSIGNMENT II.

This refers to the refusal of the court to grant the defendants a separate trial.

In passing on this motion page 70, the court said:

"If it were true that the testimony offered against one of these defendants which is not competent or material against the other, there would be strong support for your motion * * *. But the Government is evidently proceeding upon the theory that each of these co-defendants aided and abetted the other, or that there was a conspiracy between them. On that view of the case any testimony competent against one would be competent against the other.
* * *"

The court even was at a loss to know what the theory of the Government was. The indictment did not charge a conspiracy, or the aiding or abetting one or the other. As a consequence they were tried jointly upon an indictment which did not state a crime against either, at least not a conspiracy. That being so, everything Wayland had done within the statute of limitations, or without, in his whole business career was lugged in against Belden, and vice versa. The first evidence introduced was the

minute book of the Michel Company at page 10, "Exhibit 2," which was an offer to sell the coal claims to the company. A document to which Wayland was not a party. Also "Plaintiff's Exhibit 4," Articles of Incorporation of the said company. "Exhibit 7" the same. Also 11 and 12. The same thing was true throughout the entire trial. Letter after letter was introduced written by Belden and there was not any admonition by the court to the jury to disregard the evidence and no explanation or caution given. Then again, the letter set out in the first count of the indictment was written by Belden and Wayland's connection with it not shown. As to the second, it was written by Wayland and Belden never heard of it. Here were two men in business for ten years together. They are both tried together and the entire career of one is thrown into the scales against the other without any attempt to show his responsibility therefor.

If one or the other wrote a damaging letter, or made a damaging admission, the introduction against the other would certainly be prejudicial.

Let us cite two instances: Take the evidence of Mrs. Harrington (p. 250), and Mrs. Inman (p. 252), throw that into the balance against one of the defendants, and while not admissible for any purpose, yet it was admitted against both defendants. Two defendants should not be tried together where it is evidence the testimony will cover a period of several years and acts independent in their nature

will be admitted. It cannot be said that defendants convicted in that way had a fair trial.

When a conspiracy is charged and proof is being admitted the court should caution the jury that the evidence against one will not be proof against the other until the conspiracy is established, and if it is not established, instructed to disregard the evidence. This was not done in this case although no charge of conspiracy made and likewise no proof.

Steers vs. U. S., 192 Fed. 1.

The overt act must be one independent of the conspiracy or agreement. It must not be one of a series of acts constituting the agreement or conspiring together, but it must be a subsequent, independent act following the complete agreement or conspiracy, and done to carry into effect the object of the original combination.

U. S. vs. Richard, 149 Fed. 443-6.

ASSIGNMENT III.

This assignment refers to the Inland Surety Company partnership agreement. This was objectionable for the reason discussed under the assignment relative to separate trials. By the terms of the agreement written on the face it was terminated and Wayland was never a party. The termination was long prior to the incorporation of the Crown, Empire and Crows Nest Railway Company. It could

not therefore have been a part of any scheme or at least, the one set out in the indictment.

ASSIGNMENT IV.

Plaintiff's "Exhibit 8" (p. 77) was a meeting at which defendant Wayland was not present and No. 9 was an agreement to which neither defendant was party.

ASSIGNMENT VI.

This evidence did not relate to any issue raised by the indictment. The only charge in the indictment in connection with railroad stock was in representing that the money for which it was sold went to building the road when it did not. Here is stock sold for notes and a witness permitted to compute not only the amount of sales but the commission which the defendants received, without any of the circumstances or showing the unreasonableness of the charge.

ASSIGNMENT VII.

This has reference to the letter set out in the second count of the indictment. Mr. Belden's connection with it is not shown, neither is there any proof it was written or mailed by any of the defendants. If ever an innocent communication was penned this is one. It has no relation to any charge in the indictment. It could not even remotely refer to it. There is no allegation and no proof that it was intended that it should receive other than the

ordinary construction. That being so the count could not state an offense and this letter, unless it had some veiled meaning, should not have been admitted, especially against Belden.

ASSIGNMENT VIII.

"Plaintiff's Exhibit 69" was a letter written by Wayland (p. 374). "Plaintiff's Exhibit 70" is the same. "Plaintiff's Exhibit 243" (p. 419) was a circular sent out by Wayland. Also "Exhibit 244." All through the trial witnesses were permitted to testify as to what Wayland told them; what representations he made, and everything of that character. This evidence was not admissible for there was no conspiracy alleged, or established by the evidence. Covering a period of that length, having to account for their own conduct was enough, without having to answer for the omissions of a co-defendant.

ASSIGNMENT IX.

At the close of all the evidence defendants each moved the court for a directed verdict of not guilty. This assignment involves all of the evidence in the case and challenges the case made out by the Government. While it is true the Government may have introduced some evidence that the defendants made misrepresentations in regard to some matters set out in the complaint, these conversations and letters could not have related back to the organizing of these corporations. For instance, if defendant

told some one that he was selling treasury stock when it was his own personal stock, how could that be considered as reverting back and showing that at the time the corporation was organized that it was intended at a future time to make such a representation. There is no proof that at the time one set of claims was secured which were deeded to a corporation that it was intended as a part of a scheme that another should thereafter be organized. Nor is proof defendants received more stock for their locations than some other stockholders any proof. We doubt if any like group of corporations was ever conducted as apparently honest, at least as these. The situations were met as they arose. If a new group of locations was secured a corporation was organized to take them over. Instead of the fact being that the defendants knew the claims were worthless it is in evidence the Crown was valuable and Mr. Gamble the engineer whose qualifications are not questions says the same veins exist under the Empire and Michel. It is true Thomas, the Government engineer, testified the veins existed only on the Crown, yet his opinion ran counter only to Gamble and defendants and other stockholders who saw the property. The record bristles with evidence that every one was urged to go to the properties and inspect before purchasing. How can it be said in the face of these facts that this was a scheme to defraud? Are the defendants to be convicted for an error in judgment? Are they criminals because

they thought stratas of coal underlaid the Michel and Empire when it has never been demonstrated coal was not there? The history of most mining operations has been that mistakes have been made in trying to tell what was underground. Great engineers have differed as they do in this case and a layman who relies on their superior knowledge does not thereby become a criminal. The charge that personal stock was sold which was represented as treasury we have heretofore shown was unfounded. If it was the stock of a claim or corporation possessed of lands with good stratas of coal it would make no difference for it would not be an attempt to defraud. The purchaser would be getting something of value. We take it this court is not concerned with the amount of profit or extent to which a purchaser was defrauded. If you will turn to page 427 there will be found the list of officers at various times of the corporations involved. It will be seen they had four to ten directors and the entire record taken together shows that instead of the representations of defendants being false they were true and the probabilities are these are all good coal lands, and that defendants should not be selected from the large number of parties connected with the operations.

For a matter of opinion a man cannot be held responsible, criminally, or civilly.

XII Am. & Eng. Enc. of Law, p. 813.
Durland vs. U. S., 161 U. S. 306.

"A representation may be so obviously without foundation as to afford cogent evidence of a criminal intent in him who makes it but nevertheless if in fact it proceeds from honest ignorance or delusion it does not help to make a scheme to defraud within the Statute."

Rudd vs. U. S., 173 Fed. 912.

"Where all the substantial evidence is as consistent with innocence as with guilt it is the duty of the appellate court to reverse a judgment of conviction."

Harrison vs. U. S., 200 Fed. 662."

"* * * the scheme cannot be found in any mere expression of honest opinion as to quality or as to future performance."

Id.

"The ultimate issue of fact is whether defendants were actuated by an intent to defraud when using the mails."

Harrison vs. U. S., 200 Fed. 662.

"The solution of that question (intent to defraud) was not to be found in retrospection; most men are wise after the fact. * * *

"A man may be visionary in his plans and believe that they will succeed, and yet, in spite of their ultimate failure be incapable of committing conscious fraud. Human credulity may include among its victims even the supposed impostor. If the men accused in the instant case really entertained the conviction throughout that the oil properties and the stock in dispute possessed merits corresponding with their representations, they did not commit the offense charged."

Sandals vs. U. S., 213 Fed. 575.

Citing *Durland vs. U. S.*, 161 U. S. 306.

In the Durland case it is said:

"If the testimony had shown that this company, and the defendant, as its president had entered in good faith upon that business, believing that out of the money received they could by investment, or otherwise, make enough to justify the promised returns, no conviction could be sustained no matter how visionary might be the scheme."

See also

Rudd vs. U. S., 173 U. S. 912.

ASSIGNMENT X.

Upon pages 334-5-6-7 and 8 appear the court's instructions defining the crime. This, or these instructions were prejudicial to the defendants for the reason that on page 335 in the definition of false pretenses is made to include the false representations. The court was of the view that the indictment charged the defendants with having made false representations. There is not an allegation in the indictment that defendants used either false pretenses or representations, but in all of the different statements in the instrument it is alleged that they had devised a scheme by which they were to make use of them not that they did. We quote the language used all the way through:

"And it was further a part of said scheme that said defendants in the false and fraudulent manner aforesaid *would hold forth, represent, and pretend* to divers persons *to be deceived and defrauded* thereby."

Again all of the evidence of any representations made by the defendants was based upon their belief that coal existed on all of the claims. It was not shown that any of the statements made in the letters set forth in the indictment were false. The defendants were not being tried for a fraud but for using the mails in aid of a fraudulent scheme.

ASSIGNMENT XI. AND XII.

The court beginning on page 339 defined a conspiracy and "aiding and abetting" to the jury. The instructions are erroneous for the indictment does not charge a conspiracy and the evidence does not establish one. There was no charge of "aiding and abetting" in the indictment and the evidence was silent upon the subject. It gave the jury a chance to speculate as to whether there was not something in the case other than a conspiracy upon which they could hang a verdict of guilty. Aiding and abetting comes under the rule of accessory, and an indictment must charge which one is the accessory and make a direct allegation.

State vs. Gifford, 19 W. 464.

State vs. Beebe, 66 W. 463.

The instruction also advises the jury that it was not necessary for two parties "to come together to concert the means, or to give effect to the design, nor is it necessary for the conspiracy to originate with the persons charged." As a general definition this may be correct. But the defendants are jointly

indicted and of all the other parties connected with the transaction defendants are the only ones suspected. The statute provides a scheme must be devised. The indictment alleges one was, or intended to be. We fail to see how a court may properly tell a jury that a thing the law requires must not exist. A charge of devising would have been sufficient as against one, but not as to two. They both could not have been guilty unless they devised the scheme before they attempted to carry it out. The charge further tells the jury that conspiracies are never proven by direct evidence, thus leaving the jury to infer that all that was necessary was to have some one indicted and then produce a large amount of voluminous evidence without any evidence of a conspiracy and that was sufficient to convict. This is making it too easy for the Government and too hard for the defendants.

The instruction upon the question of establishing a conspiracy did not go far enough. While it is true that direct evidence is not always available. "As has often been remarked, it is not necessary that direct evidence of a formal agreement should be given in such cases. If the evidence of the separate details of the transaction as it was carried out indicates with the requisite certainty the existence of a preconcerted plan and purpose this is sufficient * * *."

Reilly vs. U. S., 106 Fed. 896-905.

ASSIGNMENT XIII.

These requested instructions asked the court to direct the jury to acquit the defendants on each count and will be considered under the general head of insufficiency of the evidence.

ASSIGNMENT XIV.

This involved defendants' request No. 10.

It requested the court to instruct the jury that as to whether there were commercial deposits of coal under the Michel and Empire claims depended upon the opinion of coal experts and a criminal intent could not be established by the testimony of an expert, neither could the guilt of defendants.

The basis of the indictment is that these two claims are valueless as coal claims. Thomas the engineer and expert for the plaintiff, so swore and gave the reasons upon which his opinion was based (p. 141 et. seq). On page 143 witness testified that there was coal underlying all of the Crown land, about 1200 acres.

Mr. Gamble, beginning at page 289, states there were large deposits of coal underlying the Crown property and in his opinion the same veins extended into the Empire and that the veins from the McInnis and Crows Nest Pass Coal Company extended under the Michel. It will be observed from this witness's testimony that this entire country is honeycombed with coal mines and workings and nothing but a

miracle could prevent their extending into these two properties.

Elmer Bell, who was called by defendants (p. 294) stated he had been on the property from July, 1910, to January, 1912, as superintendent on the Empire. Was sent there by stockholders with whom he was acquainted. That he examined the formation thoroughly and "came to the conclusion when I first looked over the property, the Empire was just as good as the Crown. That was my first conclusion and I have not changed it. I had rather have the Empire after what I saw of it than to have the Crown. The tunnel was in 447 feet, but had not reached the point where they expected to find coal.

Baptist Lameraux wrote from the Michel properties where he was prospecting (Defendants' Exhibit 81):

"In looking over timber this winter I found the vein of coal I was looking for last fall on your claim and I can show it to you at any time."

Both of defendants testified that in addition to the foregoing they were advised by the company engineer, Mr. Hower, a man of large experience that large deposits of coal underlay both the Michel and Empire.

The defendants must have devised a scheme to defraud. They must also have entertained the intent to defraud. It is impossible for the specific intent to have existed if they were of the opinion

that these two claims contained valuable deposits of coal. The charge is they were worthless and the stock of the Crown was manipulated to sell the worthless stock.

ASSIGNMENT XV.

The request would have told the jury that unless they found the Michel and Empire claims worthless they must acquit the defendants. This involves a reference to the indictment.

All of the allegations of the various counts of the indictment refer to the corporations which were to be formed as a part of the said scheme and which were to be managed by the defendants. Then on page 5 they allege that they were to procure certain alleged coal claims, having little or no value. After stating how defendants were going to organize the various companies and get control thereof by stock ownership, and otherwise (p. 8); that they would by means of reports, letters, etc. * * * represent, state and set forth that the stock of the said various companies so organized and controlled as aforesaid was of great value (9) and would become of still greater value; and that the properties owned by said various companies were of great value, etc. In various charges relative to selling treasury stock, or personal stock as treasury, it is alleged (p. 12) that "said defendants so having obtained large amounts of stock having no commercial or marketable value, etc."

It will be seen therefore that all of the various charges are based upon the defendants' manipulation of the various corporations to sell a worthless stock, and a worthless stock throughout is charged to be one representing a property which had not any commercial deposits of coal. There is not any way this indictment can be read or construed without discovering the entire basis of the fraud is the absence of coal on the Michel and Empire. The court therefore should have given this instruction.

ASSIGNMENT XVI.

There was not any evidence that either of the defendants wrote or posted the letters set out in the first and second counts of the indictment and the jury should have been so instructed (Request No. 13, p. 347).

There was not any evidence construing the letters or attempt made to show that they contained any veiled meaning. They in no wise could have aided or attempted to aid any scheme because there was no proof of any scheme and a reading of the letters cannot be construed as in any wise aiding in any attempt or scheme to defraud. The fact that they are or purport to be, signed by defendants is the only circumstance which would render them admissible. The request should have been given (No. 15, p. 348).

ASSIGNMENTS XVII. AND XVIII.

These assignments involve the defendant's requested instructions Nos. 15, 16, 17, 18, 19, and ———.

They relate to the evidence which the court permitted the Government to introduce and the bearing of such evidence upon the letters set out in the first and second counts of the indictment and which letters the indictment alleges were deposited in United States mail for the purpose of executing the alleged fraud. The statute upon which this prosecution rests, so far as material to this inquiry is as follows:

“Whoever, having devised or intending to devise any scheme or artifice to defraud * * * *shall for the purpose of executing such scheme or artifice, or attempting so to do, place, or cause to be placed, any letter * * * in any postoffice or station thereof * * * shall be fined not more than one thousand dollars or imprisonment not more than five years, or both.*”

There are two elements in the offense: First the scheme or artifice to defraud. Second, for the purpose of executing such scheme or artifice using the United States mails.

Assuming at this time for the sake of argument that the first element has been established by the Government, the question then is, What is the situation with reference to the second element?

We are not concerned with the question of whether the plaintiff in error was committing, or intending to commit, a fraud, provided the United States mail was not used in the mailing of the letter to John Niederer, set out in the first count, and the letter to Walter J. Woods, set out in the second count, "for the purpose of executing such scheme or artifice, or attempting so to do."

If we are correct in our contention that these letters set out in the first and second counts were not mailed for the purpose of executing such alleged scheme or artifice, then any evidence received for the purpose of showing fraudulent practices would be immaterial so far as establishing the commission of any crime under the statute in question.

This is not a prosecution for fraud and the Government is not concerned with reference to whether a fraud has or has not been committed, unless there has been misuse of the United States mails.

Each and all of the instructions requested by plaintiff in error above mentioned were refused by the trial court and no instructions were given dealing with the same subject. Request No. 16 would have advised the jury that this not being a prosecution for fraud it would be immaterial whether they had devised or intended to devise, any scheme or artifice to defraud, provided the letter set out in counts one and two were not for the purpose of executing such scheme or artifice. We fail to see how there can be

any escape from the conclusion that these requested instructions correctly stated the law and that the jury should have been so advised. Without such instruction there was nothing to prevent a verdict of guilty being returned, independent of any misuse of the mails.

Instructions 15 and 18 deal with the construction to be given the letter written John Niederer, and on which the first count rests. There was no attempt on the part of the Government to show that the language used in this letter was intended to convey any meaning except the natural one from the words used. There is no attempt made here to sell the personal stock of either of the plaintiffs in error, or the personal stock of International Development Company, and in fact the stock which Niederer received was treasury stock and the proceeds went into the treasury (page—). Nor was there any attempt to sell Railway stock. This being the situation, requests Nos. 15 and 18 should have been given. The principal part of the Government's evidence for the purpose of establishing a scheme or artifice to defraud was directed to attempting to show that the plaintiffs in error had sold stock, representing it to be treasury stock, when in fact it was personal stock and they had appropriated the proceeds, and to further show that they had sold Railway stock, representing it to be treasury stock, and that the proceeds were to be used in the construction of a railroad, when in fact it was their personal

stock. Should it be assumed that in these respects plaintiffs in error had overreached certain purchasers of stock, of what materiality is that as bearing upon the question of whether the plaintiffs in error in mailing the letter to Niederer were misusing the mails? If they had been guilty in the past of fraudulent practices the statute in question does not prohibit them from later using the mails lawfully. The question of previous fraudulent practices could not be an element in convicting them of a fraudulent subsequent use of the mails when such use of the mails was not for the purpose of executing such fraudulent designs. Assuming at this time that evidence relating to sales of personal stock, representing it to be treasury stock, was admissible, yet plaintiffs in error were entitled to a plain and specific instruction that such evidence could not be considered for the purpose of determining the guilt or innocence of the defendant in using the mails, where such use was not for the purpose of executing such alleged fraudulent designs.

Request No. 15 simply instructs the jury that they can give the letter written to John Niederer no meaning other than it bears upon its face, and request No. 18 should likewise have been given, instructing the jury that for the purpose of determining the guilt or innocence of plaintiffs in error said letter was not mailed for any purpose connected with the sale of plaintiff in error's own stock. Likewise, request No. 17 should have been given

and the jury told that if they found said letter related only to a sale of treasury stock, then in determining whether said letter was deposited in the mails for the purpose of executing a fraud, that the jury should disregard all evidence as to previous sales made of personal stock, representing it to be treasury stock, and all evidence relating to any misrepresentation in the sale of Railway stock.

Requested instructions 19, —, and — should have been given for the same reasons urged above as to requested instructions 15, 17 and 18. In fact, if possible, the reason for giving these requested instructions was greater. There was no connection whatever between this letter written to Walter J. Woods, set out in the second count, and any alleged fraudulent practices. It could not in the slightest be considered as having been mailed "for the purpose of executing" any scheme or artifice whatever. Certainly it was not for the purpose of executing any scheme or artifice to sell any stock to obtain any money from any person, and in particular it was not for the purpose of selling any of their own stock, representing it as treasury stock, or of selling any Railroad stock. If the action of the court in submitting the case to the jury as it was submitted can be sustained, then all that is necessary in order to sustain a conviction under this statute is to procure evidence that the accused party has committed a fraud and that he has deposited a letter in the United States mail. The requirement of the

statute that the letter must be deposited for the purpose of executing such fraud is a dead letter.

The argument made under these assignments here considered bears on many other of the assignments above discussed, particularly as to the overruling of the demurrer to the second count and the acceptance of much of the evidence.

"* * * But the gist of the offense consists in the use of the mail. The *corpus delicti* was the mailing of the letter in the execution of the unlawful scheme. * * *"

U. S. vs. Jones, 10 Fed. 469, 470.

This interpretation of the law fails to distinguish the fraud from the use of the postoffice to effectuate it, with which the Federal law is alone concerned."

U. S. vs. Clark, 125 Fed. 92, 94.

"The second and fourth counts, however are bad. In the second it is not charged that the letter there said to have been deposited in the postoffice was so deposited for the purpose of carrying out or executing the fraudulent scheme which the defendants are alleged to have devised. This is a material part of the offense and cannot be omitted. It is the use of the mails as a means of accomplishing the fraud that is the gravamen of the charge, and we cannot supply it by intendment."

U. S. vs. Clark, 125 Fed. 92, 93.

While in the indictment it is alleged that these letters were mailed for the purpose of executing the alleged fraud, yet the allegation cannot take the place of proof. The *allegata* and *probata* must conform. If there is any part of the allegation that

is not sustained by the proof the court should limit the allegations which go to the jury to those which are sustained by proof. In other words, the allegation that the letters were deposited in the mail for the purpose of executing the scheme or artifice to defraud by sale of their individual stock, representing it to be treasury stock, selling their individual Railway stock under representation that the money was to be used in constructing a railroad, should have been withdrawn from the jury, where the evidence disclosed that the letters were not written for any purpose connected with the execution of a sale of their individual stock, representing it to be treasury, or a sale of Railroad stock, representing that the proceeds were to be used for the construction of a railroad.

“In my opinion the gist of the offense under the statute is the use of the mails necessarily intended as a material part of the scheme to defraud. Do the letters set out in the indictment, or any of them, show that they were in any way necessary or intended by the parties as a part necessary to carry out the fraudulent scheme contemplated by them? A mere glance at the contents of the letters, which have been hereinbefore fully set out, shows that they were no part of the fraudulent scheme. They were not, as was the case in *Weeber v. United States*, supra, sent through the mails in order to be used in carrying out the fraudulent scheme, nor were they intended to be shown to the intended victims for that purpose. They were simply intended to keep the intended victims themselves informed as to the acts and progress

made by the different members to the conspiracy. This is not sufficient to bring the acts within the meaning of the statute. * * * The letters set out in the indictment merely show that the defendants used the mails for the purpose of concocting schemes to defraud, but not the purpose of carrying them into effect, nor were they written to be used as a part of the fraudulent scheme. That Congress has the constitutional power to prohibit the use of the mails for such criminal purposes cannot be doubted, but, unfortunately, it has so far failed to exercise it, and until it does, the courts are powerless to interfere."

Knudsen vs. Benn, 123 Fed. 634, 636.

"Another observation to be made concerning the indictment is this: That while the fraudulent scheme, as described, was one whereby the mails were to be employed to induce persons to come to Webb City, to be afterwards defrauded, yet the letter which was deposited in the mails by Gillett, on which the third count is founded, does not seem to have been written to accomplish any such purpose, and for that reason it can hardly be said to have been deposited in the mail in execution of such a scheme as the indictment describes. It was written, as it seems, long after Davis had been induced to go to Webb City and after he had wagered his money and sustained all the loss that he could possibly sustain by reason of the alleged fraudulent scheme."

Stewart vs. U. S., 119 Fed. 89, 95-96.

"We do not wish to be understood as intimating that in order to constitute the offense it must be shown that the letters so mailed were of a nature calculated to be effective in carrying out the fraudulent scheme. It is enough if, having devised a scheme to defraud, the defendant, with a view of executing it,

deposits in the postoffice letters which he thinks may assist in acrrying it into effect, although in the judgment of the jury they may be absolutely ineffective therefor."

Durland vs. U. S., 161 U. S. 306, 315; 40 L. Ed. 709, 712.

ASSIGNMENT XIX.

Request 20, p. 349, should have been given and the jury should not have been permitted to speculate on all of the ramifications of the case, but confined by proper instruction to the allegations of the indictment.

Request 23, p. 350, should have been given for it would have advised the jury that if no misrepresentations were made by defendants as to the presence of coal on the Empire and Michel, the defendants could not be found guilty. As we have heretofore stated it was upon this theory the prosecution was based. The jury should have been permitted to pass upon the question as to whether any such misrepresentations were made, and told if none were to acquit. The evidence is overwhelming that the defendants always insisted on prospective purchasers going up and looking at the properties. This is not denied.

There is some little evidence that defendants said there were veins of coal on these properties and that some samples had been taken therefrom. This they deny.

All this request asked was that the jury be permitted to pass upon this question. Nowhere in

the charge of the court was the question placed before the jury. The request did not state it as a finality, but only that the jury be permitted to pass upon it. If no such misrepresentations were made the defendants could not have been found guilty.

ARGUMENT.

The facts in the case have been pretty fully covered in the argument under the different Assignments.

In conclusion we desire to call the Court's attention to the facts which in our opinion, would warrant this court in holding, as a matter of law, that the Government had not made a case against the defendant and that the defendant's motion made at the close of the evidence should have been granted. We will not beg the question, and will not contend that witnesses did not swear to facts which, if believed by a jury, would establish a civil liability for damages. We must take it from the rulings of the court that the Government is proceeding upon the theory of a conspiracy. The conspiracy must be established before any of the overt acts showing intent are admissible. Each overt act is a separate offense and they are admissible only to show the intent. In this case we have the court admitting the acts to show the intent prior to the time it is

claimed any conspiracy was formed. Now eliminate from the case the acts ordinarily incident to the promotion of these corporations and what have we? Merely the overt acts, or acts which it is claimed go to the question of intent. Go to the alleged indictment and you find it was a part of the scheme to defraud. Look at the evidence and we find that they were admitted for the purpose of showing intent. There is then no proof of the original scheme, combination or conspiracy. If there is not defendants are entitled to acquittal.

There are only two facts in the record which at all reflect upon the integrity of defendants, viz: The charge that with the sale of stock \$100.00 worth of Railroad stock was thrown in which was to be used in the securing of a right of way and construction of a road. The other, the charge that personal stock was sold under the representation that it was treasury and the money was to be used for development. Both of defendants denied these charges, but conceding they were true: Is there any proof that at the time the first corporation was organized that these defendants intended to incorporate a railway company, or try to construct a railway? Of course there isn't. Is there any proof that at the time any of the corporations were organized that they intended forming other corporations? There is not. We are then left to one of two conclusions. Either that the scheme is established by acts which are admissible only for the purpose of proving in-

tent, or that total failure of any proof of a scheme establishes it.

If it is true they sold personal stock saying it was treasury they might be liable to the corporation, or to the party to whom it was sold providing they could show any damages. On this question, we believe, the burden of proof was with the defendants. A great many of the witnesses for the Government signed receipts, p. 302, Defendants' Exhibits 187, 188 and 193, p. 427, acknowledging they were receiving personal stock.

As to the alleged sale of Empire stock and giving \$100.00 worth of railway stock with every \$500.00 worth, it is scarcely worthy of notice for there were only three or four of such transactions (p. 279). It is impossible this could have been a part of the original scheme and if not defendants are entitled to an acquittal. Defendants must be convicted upon each of the schemes, in other words, if they devised it, it must be established as charged.

From the standpoint of the "rule of reason" is there even a probability that these defendants had any intent to defraud? They took all means possible to insure the location of good claims. Belden was on the claims for nearly a year at a stretch. Good and capable engineers were employed. The Crown is confessedly good ground. The defendants maintained the offices and worked without a salary, except one year.

When it came to the question of raising the money for the railroad a man was sent to Paris to raise the money. The offer of the foreign financiers was turned down, for at the Payette meeting the stockholders and directors thought it could be done better at home by raising the money among the farmers (p. 275), and new estimates were secured on construction of the road. An attempt was made to take notes from farmers and use them, but it was not successful. Selling bonds was resorted to, but the slump in the financial market rendered them unsalable. Defendants traded their own stock for equities in farms and town property, and the amount they received or realized from cash sales would not much more than pay agents' commissions, stock sales and office expenses. The lands or equities received in trades were a liability rather than an asset and were all lost (p. 303).

If ever an effort was made to finance a corporation, it was this one. Instead of going abroad and paying a large commission they endeavored to raise the money among their own people, farmers and men of small means. They did not succeed, chiefly on account of financial conditions. Had they been able to float the bonds, the road would have been built, tunnels run and coal shipped. As it did not, defendants fell prey to the Post Office Inspectors. (Defendants' Exhibit 184, p. 426.)

Take the excerpts introduced from defendants' correspondence, beginning about Defendants' Exhibit

151, written away back in 1909; the list of officers and directors, and the whole situation bears upon its face the stamp of an earnest desire to make a success of this enterprise. If it were merely a scheme the defendants would not have put forth the effort they did to make it a success. Instead of raising the sums of money they did for the companies they would have been raising more for themselves. Not only do these communications evince an earnest desire to help the stockholders but the action of the defendants in permitting the witness House to have access to their entire office for nine months shows they had nothing to conceal (p. 166).

If this enterprise had succeeded the defendants would have been heralded, wined and dined by the stockholders, but as it was retarded by financial conditions and departmental investigations, they are condemned.

It is evident there were times when the eastern interests tried to wrest control from the west and different sorts of manipulations were resorted to to keep the control in the west, but that was not a part of, or the forming of any scheme.

Here was a case tried before a jury of farmers against two men who had attempted to finance a great operating corporation with the farmers' aid. The farmers had lost their money, and with them two or three poor women. Those who lost poured their woes into the ears of a sympathetic jury. Even

then the verdict could not have reflected the opinions of the jury for in each case they recommended leniency.

We submit the case should not only be reversed, but dismissed as to the plaintiff in error, Belden.

FRED C. ROBERTSON,
FRED MILLER,

Attorneys for Plaintiff in Error, Russell G. Belden.

IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

RUSSELL G. BELDEN and A.
EUGENE WAYLAND,
Plaintiffs in Error,
vs.
UNITED STATES OF AMERICA,
Defendant in Error.

UPON WRIT OF ERROR TO THE UNITED
STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF WASHING-
TON, NORTHERN DIVISION.

BRIEF OF DEFENDANT IN ERROR

FRANCIS A. GARRECHT,
United States Attorney,
Eastern District of Washington.

AN EXPLANATION.

In view of the possibilities under Rule 24, it was deemed imprudent at this distance from the office of the Clerk to delay the preparation of the brief of defendant in error until that of plaintiff in error had been served. Accordingly, this brief was in print prior to the service of the brief of plaintiff in error. Herein the Assignments of Error as printed in the Transcript are followed, which differ from the Assignments in the brief of plaintiff in error. The Court is requested to note the appended memorandum, which attempts to harmonize the apparent discrepancy.

Assignments according to brief of Plain- tiff in Error.	Assignments of Error according to Transcript and herein
I. ----- Same as -----	1 and 2
II. ----- Same as -----	3
III. ----- Same as -----	4
IV. ----- New, not assigned as error----	
V. ----- Similar to -----	10
VI. ----- Similar to -----	7, 8, 9, 11, 13, 14
VII. ----- Same as -----	20
VIII. ----- Answered under 3, same as--	24
IX. ----- Same as -----	23
X. ----- New, not assigned as error----	
XI. and XII. Same as -----	28, 29, 30, 31, 32
XIII. ----- New, not assigned as error----	
XIV. ----- Same as -----	33
XV. ----- Same as -----	34
XVI. ----- Same as -----	35-36
XVII. ----- Same as -----	38
XVIII. ----- Same as -----	39-40
XIX. ----- Same as -----	41-43
XX., XXI.,	
XXII. ----- New, not assigned as error----	

The Argument on the other assignments fully cover those designated herein as new.

IN THE

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<i>Plaintiffs in Error,</i>	
vs.	
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<i>Defendant in Error.</i>	

STATEMENT OF THE CASE.

The defendants, R. G. Belden and A. E. Wayland, were convicted of the use or misuse of the United States mail and Post-office establishment of the Government in furtherance of schemes and artifices to defraud certain persons and the public generally. One of the defendants, R. G. Belden, has prosecuted his appeal. The facts are substantially as follows:

Before or while engaged in organizing the various coal mining companies as hereafter explained, defendants had persuaded themselves, as expressed in a letter which was offered in evidence *that the public was anxious to invest in coal*. (Transcript p. 394, Plffs. Ex. No. 121.)

In 1905 these defendants and another owned the R. G. Belden Company, a corporation, which company had an option on sixteen locations in the Kootenai District, B. C. In April of that year defendants organized the *International Development Company*, another corporation capitalized on paper for \$30,000, and the R. G. Belden Company subscribed for the entire capital stock of \$30,000; and, in full payment thereof, transferred to the International Development Company the option held by the R. G. Belden Company on the sixteen coal locations before mentioned. (Transcript, pp. 314, 72, 358, 360, 73, 263, 264, 77.)

Later in the same year these coal locations were abandoned. Defendant Belden and one Batiste Lamereaux then staked four other coal claims on the Michel Creek several miles north of Crows Nest, which were afterwards located, two in the names of C. L. Butterfield and J. T. Penn and the other two in the names of Ellen LeFranze and Elizabeth Martin. (Transcript, pp. 263, 264, 360, 361.)

The defendants then caused to be organized another corporation, the Michel Coal Mines, Limited, with 1,500,000 shares of stock at the par value of \$1.00. The defendants then, acting through the International Development Company, transferred the two

claims staked in the names of Butterfield and Penn for the entire 1,500,000 shares of the company's stock, but returned 500,000 shares to the company for treasury stock, keeping the other 1,000,000 shares as individual, personal or promoter's stock. (Transcript pp. 75, 76, 359; Ex. 4, p. 360; pp. 166, 167, 169.)

Then a partnership with one S. W. O'Brien was formed under the firm name of The Inland Surety Company, which company was to act as the fiscal agents for the Michel and to receive 20% commission on sales of treasury stock. O'Brien was to do the printing for the company, that is, the International Development Company, the pamphlets and prospectuses of which contained glowing indorsements of the Michel property and were distributed through the mail by the co-partnership, the Inland Surety Company. (Transcript pp. 366; Ex. No. 23, pp. 77, 360, 361, 82, 83, 84; Ex. No. 31, p. 366, 367, 139.)

Thereafter the Michel Company bought the two remaining claims which had been staked by Belden and located in the names of Miss LeFranze and Miss Martin for \$2500.00 in cash and 50,000 shares of treasury stock. The International Development Company, owned by these defendants, received all of this money and 40,000 shares of this stock, the other 10,000 shares being divided between the two women who had permitted the use of their names without any knowledge of the purpose. (Transcript, pp. 362; Plff. Exs. 11, 12, 14, p. 372; Ex. 47, p. 80.)

Defendants, about January, 1906, began selling the stock of this company. During 1906, 1907 and

1908, some work was done on the claims, 450 feet of tunnel was excavated, but without locating coal. Work was then discontinued. Nevertheless, an article was printed in the Spokane Chronicle containing the statement that a twenty-foot vein of coal had been discovered, purported clippings of which statement were circulated through the mails by defendants, when no twenty-foot vein of coal had been discovered, and at no time was any kind of merchantable coal found on the Michel. As stated, no work was done after 1908, but defendants sold stock in this alleged coal mine to the amount of 963,532 shares of the individual stock, receiving therefor \$85,399.24. (Transcript pp. 86, 87, 137, 138, 141, 143, 296; Ex. No. 243, p. 419; Ex. 76, pp. 381, 382; Ex. 80, pp. 382, 275.)

To go back again to 1906, J. H. Hemphill, at that time a member of the International Development Company, staked ten additional locations on Crown Mountain, on vacant ground adjoining the Michel. These claims were located in the names of defendants and of friends and relations, but were owned by the International Development Company, which company, the Court should always keep in mind, was the organization owned and controlled by the defendants and through which they manipulated all the other companies and corporations. (p. 144; Ex. 89 to 99, p. 384; Ex. 103, p. 385.)

To take over these ten claims on Crown mountain these defendants conceived another corporation which was to consist of 2,000,000 shares. But to enable them to get some cash without the necesisty of wait-

ing for the sale of shares of stock in the corporation to be organized in the future, they first formulated a syndicate, divided into twenty units, for the purpose of subscribing \$30,000, \$21,000 of which, with 100,000 shares of stock, defendants represented were to go to the owners of the claims and \$9000.00 to the International Development Company, and in fact all of the proceeds went to the International Development Company. Each unit was to produce \$1500.00. In return there would be distributed to each unit 50,000 shares in the contemplated company, and a prorata interest in 150,000 shares. Ten of the units were taken by outside parties and ten by the International Development Company. (Pp. 144, 146, 384, 385, 394; Ex. 47, Ex. 54, Ex. 108, p. 386, 387, 388.)

Thereupon the defendants organized the Crown Coal and Coke Company in September, 1906, with 2,000,000 shares of stock, par value \$1.00. The International Development Company then turned over to the corporation the ten coal locations as the purchase price of all the stock, of which 750,000 shares were returned for treasury stock. The remaining 1,250,000 shares were divided according to the syndicate agreement whereby the Internatioal Development Company received \$15,000 in cash and 575,000 shares of the stock. (Ex. 103; Transcript, p. 385; Exs. 89 to 99, p. 384; Ex. 47, p. 372.)

Subsequent development proved the Crown property did contain valuable coal deposits, but even these were exaggerated, and, as alleged in the indictment and as appeared in the proof, the excellent showing

made on the Crown was used to effectuate the sale of stock in the worthless mines. Some of the letters written by defendant R. G. Belden, to the agents contained such suggestions as "use Crown stock as bait," and "sweetening with Crown." (Ex. 146, 147, p. 402; Ex. 148, pp. 402, 403; Ex. 237, p. 417; Ex. 236, p. 416; Ex. 107, p. 387; Ex. 31, p. 366; Ex. 118, 119, 120, p. 393; Ex. 147, p. 402, transcript 183.)

In February, 1908, defendants organized another corporation, the Crow's Nest & Northern Railway Company, capitalized for \$2,000,000, divided into 20,000 shares, at \$100. This was a British Columbia corporation, all the others being corporations of the State of Washington. By the Canadian law, \$100,000 of the stock had to be subscribed, and 10 per cent of this amount deposited in some bank in British Columbia before a legal meeting could be held. So these defendants, through their control of the Crown Coal & Coke Company, had this company subscribe for 1,000 shares of railroad stock, which amounted to the required \$100,000, in payment of which the Crown Coal & Coke Company put \$10,000 in cash in a British Columbia bank; and, for the other \$90,000, gave the railroad company an exclusive right of way over land it did not own. (Ex. 102, p. 385; Ex. 54, p. 372; Ex. 104, p. 386; Ex. 105, p. 386; Ex. 106, p. 387; Ex. 125, pp. 396, 397.)

Further, these defendants caused the railroad company to exchange 2,000 shares of its stock, par value \$200,000, for 150,000 shares of Crown stock, par value \$150,000, which was not only a loss to the railroad

company on the face of the transaction, but gave the Crown Coal & Coke Company control of the railroad company. (Ex. 125, p. 396; Ex. 126, p. 397; Ex. 127, p. 398.)

Later two more claims were staked in the names of Ada J. Giles and Alice Cope, acquaintances of defendants. These are east of the Crown property and upon them no coal indications were ever found. The defendants again arranged a semi-syndicate as before outlined to raise \$40,000, ostensibly to buy these two claims which they already owned. They disposed of about 700,000 shares in the prospective company at 4c, and the \$28,000 so realized went to the defendants through their corporation, the International Development Company. The two women received 500 shares of Mill's Syndicate stock for the use of their names. (Transcript, pp. 192, 193; Ex. 144, p. 401; Ex. 145, p. 401; Ex. 142, p. 401.)

Thereupon, March, 1909, the defendants organized another corporation, the Empire Coal Company, with 1,500,000 shares at par value of \$1.00. Defendants then turned over the two claims to the company for its entire capital stock, retained 1,000,000 shares for themselves, and returned 500,000 shares as treasury stock. (Ex. 141, p. 401.)

A combination stock sale, supposedly to assist the railroad company, was then begun. The offer now being that with every \$500.00 stock sale of the Empire one share of railroad stock was to be given as a bonus. The arrangements being that of every \$500.00 received, \$100.00 would go to the railroad company

treasury to pay for one of its shares of stock. On this plan defendants disposed of 97 shares of railroad stock; received therefor \$9,700.00, all of which was the individual, personal promoters' stock of the International Development Company, and the \$9,700 so received went to their company, which defendants owned, and not to the treasury of the railroad company. (Transcript, pp. 183, 186, 194, 201, 206, 239, 245.)

We have now outlined the organization of the five corporations named in the indictment, viz: the International Development Company, whose capital stock of \$30,000 was paid for with 16 coal locations later discarded; the Michel, capitalized for \$1,500,000, the four claims of which cost less than \$500.00; the Crown Coal & Coke Company, capitalized for \$2,000,000, the ten locations costing about \$2500; the Crows Nest & Northern Railroad Company, capitalized for \$2,000,000, cost practically nothing; the Empire Coal & Coke Company, capitalized for \$1,500,000, costing not to exceed \$500; aggregating in all a capital stock on paper of over \$7,000,000, costing less than \$5,000.

Defendants, during all of these times, by various schemes and devices, were controlling, directing and managing these corporations and engaging in stock sales, securing money through false representations of facts, and in furtherance of their artifices to defraud, made use of the mails and the post-office establishment of the United States. (Transcript, pp. 185, 224; Ex. 108, p. 388; Ex. 109, p. 389; Ex. 112, p. 393; Ex. 123,

p. 395; Ex. 124, p. 396; Ex. 185, p. 410; Ex. 186, p. 410; Ex. 230, p. 414; Ex. 150, p. 404; Ex. 157, p. 404, 405, 406, 407; Ex. 175, p. 408; Ex. 177, p. 409; Ex. 227, p. 413; Ex. 228, p. 413; Ex. 229, p. 414; Ex. 239, p. 418; Ex. 241, p. 418.)

To particularize briefly, it was charged and proven, that defendants represented that all the stocks of these various coal companies were valuable and would increase in value and would soon pay dividends, while they were never of value for coal, except the Crown, and none ever paid any dividends. (Transcript, pp. 229, 230, 233, 250, 251.)

They made representations that they were selling treasury stock of these companies and the proceeds were to be used to improve the property, when in fact they were disposing of their own, individual, and promoters' stocks. (Transcript. pp. 201, 206, 217, 221, 227, 228, 231, 232, 234, 240, 249, 254, 255, 256, 322. Ex. 32, pp. 367, 368, 369, 370, 123, 136, 164, 166, 177, 180.)

They procured resolutions to be passed by the various corporations designating their personal company, the International Development Company, as the fiscal agent for all the companies. (Transcript, p. 115. Ex. 143, p. 401; Exs. 8 and 9, pp. 361, 270, 173.)

They had passed a resolution by the Crown Coal & Coke Company authorizing defendants, through the International Development Company, to vote the stock owned by the Crown in the Crows Nest & Northern Railroad Company, and a like resolution empowering them to vote the railroad stock in the Crown Com-

pany, thus controlling both corporations. (Ex. 138, p. 400; Ex. 139, p. 400; Ex. 140, p. 400.)

They represented the property of the Michel to be valuable for coal, when no coal veins had ever been disclosed. After having done considerable work without finding any coal veins, and after discontinuing work on this claim in 1908, they continued to sell stock, representing to purchasers that there were coal veins on the property. (Ex. 80, p. 382, 383; Ex. 76, p. 381; transcript, pp. 141, 142, 118, 119, 286, 287, 332.)

As to the railroad corporation, they represented that the rails had been purchased, which was not true; that the entire right-of-way had been secured, which also was not true. (Transcript, pp. 203, 209, 216, 217, 219, 237, 238. Ex. 147, p. 402; Ex. 150, p. 403; Ex. 225, p. 412.)

As to the Crown Coal & Coke Company, as said, it had valuable showings, but these were used to sell the worthless stock of the other companies. In the literature of the other corporations, promulgated and circulated by defendants, descriptions of the Crown Company appeared in such a way as to mislead any but a careful reader into believing that the glowing representations as to the Crown property applied equally to the other properties. (Transcript, 183, 207, 239, 252. Ex. 31, p. 366; Ex. 107, p. 387; Exs. 118, 119, 120, p. 393; Exs. 146, 147, p. 402; Ex. 157, p. 405; Ex. 242, p. 418, 419.)

These defendants went further to facilitate sales of the Empire stock and represented that there was a

contemplated consolidation between it and the Crown Company, and made like misrepresentations to dispose of the Michel Company stock, when in truth and in fact, as these defendants well knew, the shareholders of the Crown Coal & Coke Company never intended any such consolidation. (Ex. 69, p. 374, 375, 376, 377, 378. Ex. 70, p. 379.)

Defendants practiced other frauds and misrepresentations whereby their commisions on sales were increased. (Transcript, pp. 163, 164, 165.)

The campaign of stock selling conducted by these defendants, as the evidence shows, had the following results:

On the Michel, represented as having a twenty-foot coal vein, but in fact worthless as a coal property, the defendants sold of their own individual personal or promoters' stock, shares for which they received in money, real estate, notes and other property, \$85,399.24. (Ex. 80. p. 382; Ex. 76, p. 381; transcript, pp. 138, 173.)

Of the Empire, the acquisition of which defendants represented to have cost \$40,000, but for which they actually expended about \$500, had no value as a coal property, although they represented that it contained millions of tons of coal and timber rights worth its cost, which also was not true. (Transcript, pp. 185, 243, 245, 251. Ex. 146, p. 402; Ex. 107, p. 387. Transcript, pp. 152, 156, 143, 274, 251, 252, 253.) In this company defendants sold of their own individual personal or promoters' stock shares for which they received in money, real estate, notes and other prop-

erty, \$163,478.78. (Transcript, pp. 195, 197, 198, 200.)

They also sold and disposed of personal or promoters' stock in the Crows Nest & Northern Railroad Company, for which they received money, real estate, notes and other property to the amount of \$13,207, besides large amounts in the Crown property. (Transcript, p. 163.)

As a net result of the activities of these defendants for about seven and one-half years, this little close corporation, the International Development Company, owned and controlled and managed by the defendants, whose original stock of \$30,000 was paid for in full by the exchange of an option on sixteen coal locations which were afterwards discarded as worthless, shows by its books to have declared the following dividends:

January 2nd, 1911, dividends-----\$ 70,000

November 18, 1912, dividends----- 300,000

(Ex. 16, pp. 363, 364, 365.)

In addition, these defendants paid to themselves, from funds of the company, the salary of \$10,000 per year. (Transcript, pp. 175, 177.)

POINTS AND AUTHORITIES.

I.

Not a conspiracy, but the misuse of the mail in furtherance of a scheme to defraud is the gist of the offense:

Sec. 215 Criminal Code.

Gould v. U. S., 209 Fed., 730.

II.

It was not necessary to allege a conspiracy to commit the crime charged; indeed, it would have been improper to do so.

A scheme to defraud is a conspiracy in operation, and although the conspiracy as such, is not charged, evidence showing its existence is admissible to prove the scheme.

Marrin vs. U. S., 167 Fed. 951.
5 R. C. L., p. 1087, Sec. 36.

III.

Persons who induce others by false and fraudulent representations and pretenses to part with their property are guilty of devising a scheme or artifice to defraud within the meaning of the statute.

Wilson v. U. S., 190 Fed., 427.
U. S. v. Goldman, 207 Fed., 1002.
Gould v. U. S., 209 Fed., 730.

IV.

No error was committed in permitting the defendants to be tried together. Where the defendants combined to perform certain acts and the proof shows a general plan of co-operation and concerted action, together with a community interest in the fruits of their endeavors, then the acts, declarations or letters of each relating to the subject matter are admissible against both.

5 R. C. L., p. 1089, Sec. 39.
Wilson v. U. S., 190 Fed., 436.
Fitzpatrick v. U. S., 178 U. S., 313.
Wiborg v. U. S., 163 U. S., 633.
8 Cyc., 679.
1 R. C. L., p. 518, Sec. 60.

V.

The Government having shown that defendants represented that they were selling treasury stock, the proceeds of which were to improve and develop the properties, when in fact they were selling personal stock and pocketing the receipts; that they represented that the right-of-way for the railroad had been secured and the rails bought, which was not true; that the Michel and Empire claims were valuable for coal and that coal and coal veins had been found on the properties, all of which was not true; that the stock was valuable and would increase in value and soon pay dividends, while they were never valuable and never paid dividends; the evidence is sufficient to substantiate fraudulent representations.

Wilson v. U. S., 190 Fed., 434.

VI.

Having shown that the defendants used these false and fraudulent means to induce persons to part with their property and to purchase stock which was not of the value represented, the Government was not required to go further and demonstrate that there was no coal on the premises, and even if an expert gave it as his opinion that coal would be found, this was not proof of defendants' good faith; nor could it warrant them in making glittering and alluring promises of large returns on small investments, or employing the other false representations made use of by them in despoiling the public as they did.

U. S. v. Goldman, 207 Fed., 1002.
Wilson v. U. S., 190 Fed., 434.
Durland v. U. S., 161 U. S., 313
Brooks v. U. S., 146 Fed., 230.
Cooper v. Schlesinger, 111 U. S., 148.
U. S. v. Bradford, 148 Fed., 424.
Horn v. U. S., 182 Fed., 739.

VII.

The letters set out in the indictment need not show on their face that they were of a nature calculated to be effective in carrying out the alleged fraudulent scheme.

The letters were mailed in connection with the scheme, whether the same was fraudulent, or whether the letters were mailed for the purpose of assisting in its execution, were questions for the jury.

Gould v. U. S., 209 Fed., 735.
Durland v. U. S., 161 U. S., 315.
Lemon v. U. S., 164 Fed., 958.

VIII.

The Federal Courts of Appeals hold that an objection to evidence upon the ground that it was "incompetent, irrelevant and immaterial" is insufficient to warrant review.

District of Columbia v. Wordbury, 136 U. S., 627.
Davis v. U. S., 107 Fed., 757.
Patrick v. Graham, 132 U. S., 627.
Camden v. Doremus, 44 U. S., 515.
Am. C. & F. v. Brinkman, 146 Fed., 716.
Reilley v. U. S., 106 Fed., 905.
Baltimore & O. R. R. Co. v. Hellenenthal, 88 Fed., 119.
Western Union v. Burgers, 108 Fed., 30.
Steers v. U. S., 192 Fed., 1.

ARGUMENT.

ASSIGNMENTS OF ERROR 1 AND 2.

Defendant complains because conspiracy is not charged in the indictment. To have done so in express terms would have rendered the pleading liable to attack for charging more than one crime.

There are two distinct statutes, under either of which defendants might have been indicted.

Under Revised Statutes, Sec. 5440, a conspiracy to commit an offense against the United States, if followed by an overt act, is itself a crime.

Under Sec. 215 of the Criminal Code, the use of the mails to carry out a fraudulent scheme is also a crime.

In this case, defendants were not charged with a conspiracy to commit an offense, but with the use of the mails pursuant to a fraudulent scheme.

Thus, *the use of the mails* in furtherance of such scheme, is the gist of the offense. In other words, it is not the scheme or the conspiracy, but the use made of the mails, that is the material thing.

As was said in *Marrin v. United States*, 167 Fed., at page 955:

"A scheme to defraud being a conspiracy in effect, and the overt act, the carrying of it out by means of the mails being the substantial thing," it is not necessary to combine the two.

It is fundamental in every prosecution that the indictment inform the defendant of the offense which he is to meet and to have it so described and identified that he will be protected from having to defend against

it a second time. Thus it was incumbent upon the Government to clearly charge the misuse of the mails and at the same time do it in such a way that it would not be susceptible of a construction that the crime charged was conspiracy.

It is a general rule

"That upon the trial of an indictment for a crime, evidence is admissible to prove a conspiracy to commit the crime charged, *although the conspiracy is not charged in the indictment.*"

"This is not permitted for the purpose of allowing a conviction of a crime not charged, but to lay a foundation for the admission of evidence."

5 R. C. L., p. 1087, Sec. 36, and cases cited.

The only complaint in this connection here is that the defendants should have been tried separately, or that the evidence against one should not have been admitted as against the other.

That the indictment indicates that the defendants acted together, jointly scheming, manipulating and controlling these corporations, and jointly making sales by false representations and sharing the profits, is as clear as the proof of these facts was conclusive.

Indeed, this was referred to by the trial court at the very threshold of the case (transcript, p. 70), when, in answer to defendants' application for separate trials, the learned judge said:

"The *Government is evidently proceeding* upon the theory that each of these co-defendants aided and abetted the other, or that there was a conspiracy between them."

ASSIGNMENTS OF ERROR 3, 4 AND 5.

By these assignments, error is claimed in that the Court denied esparate trials to defendants and permitted the Government to show the acts and dealings of one defendant occurring in the absence of the other.

It clearly appears from the evidence throughout the trial that the defendants were acting together carrying out a common plan. There are signed letters showing a common enterprise and understanding, and connecting them with both the Inland Surety Company and International Development Company, through which their operations were largely conducted. (See transcript, Ex. 70, p. 379; Ex. 111, pp. 390, 392; Ex. 69, p. 374; Exs. 138-39-40, p. 400; Ex. 1, p. 358; Ex. 16, p. 363-4; Ex. 89, p. 384; Exs. 90 to 99, p. 384; Exs. 102, 103, p. 385; Ex. 104, p. 386; Ex. 105, p. 386-7; Ex. 125, p. 396. Also oral testimony of witnesses, and transcript, pp. 112, 114, 116, 117, 185, 202, 208, 210, 211, 219, 224, 238, 241, 249.)

"When a conspiracy is established, everything said, written, or done by either of the conspirators in execution or furtherance of the common purpose is deemed to have been said, done or written by every-one of them, and may be proved against each."

5 *R. C. L.*, p. 1089, Sec. 39.

Defendants contend that the jury should have been advised that the evidence against one defendant would not be proof against the other until the conspiracy was established. We concede this to be a correct statement of the law, but when defendant says

that this was not done, we challenge the assertion. The Court, in its instruction to the jury, said:

"But unless you find beyond a reasonable doubt that there was a conspiracy or that one of the defendants aided, abetted, counseled, commanded, induced or procured the commission of the crime by the other, each defendant is criminally responsible for his own acts and his own conduct, if guilty at all." (Transcript, p. 341.)

AS TO ASSIGNMENT OF ERROR 20.

The purpose of this letter, Exhibit 185, p. 218, as appears upon its face, was in furtherance of the scheme and plan of defendants to direct, control and manipulate the various corporations mentioned in the indictment. On the argument of the motion for a new trial, it was urged that this letter (Ex. 185) had been erroneously admitted because the signature of A. E. Wayland thereto appended had not been proven. The Court will observe that the objection (p. 218) is a most general one, and did not advise the trial court that there was any question as to the genuineness of the signature or that the objection was on that ground, and the ruling would, therefore, not be error.

Euquhart v. Cass, 60 Wash., 251.

Tacklenburg v. Everett R. L. & W. Co., 59 Wash., 389.

Bolster v. Stocks, 13 Wash., 462.

Kroenert v. Falk, 32 Wash., 181.

Earles v. Bigelow, 7 Wash., 858.

State v. Pittam, 32 Wash., 137.

Besides, the objection was not sufficiently explicit to constitute error. The Federal Courts of Appeal, and most of the state courts, hold that an objection to

evidence upon the ground that it was "incompetent, irrelevant and immaterial" is insufficient to warrant review.

District of Columbia v. Wordbury, 136 U. S., 627.

Davis v. U. S., 107 Fed., 757.

Patrick v. Graham, 132 U. S., 627.

Camden v. Doremus, 44 U. S., 515.

Am. C. & F. Co. v. Brinkman, 146 Fed., 716.

Reilly v. U. S., 106 Fed., 905.

Baltimore & O. R. R. Co. v. Hellenthal, 88 Fed., 119.

Western Union v. Burgers, 108 Fed., 30.

Steers v. U. S., 192 Fed., 1.

(*Mo.*) *St. v. Casleton*, 164 S. W., 492.

(*S. Dak.*) *St. v. Davers*, 143 N. W., 364.

(*Iowa*) *St. v. Wilson*, 141 N. W., 357.

Further, when defendant Weyland testified in his own behalf, he tacitly admitted the signature. (Transcript, p. 319. Compare Exs. 185 and 244.)

ASSIGNMENT OF ERROR 23.

The error suggested by this assignment is that the evidence fails to establish the crime charged.

A reading of the statement of this case, found at the opening of this brief, and an examination of the transcript at the pages there indicated, will effectually dispose of this claim of error.

VARIOUS ASSIGNMENTS OF ERROR.

Assignments of Error Nos. 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 21 and 22 not only have no merit as the evidence complained of was competent and pertinent, but besides, as appears from the

Transcript of Record herein, said evidence was admitted without objection. See transcript, pp. 118, 122, 137, 138, 177, 194, 195, 139, 194, 194, 201, 206, 212, 213, 216, 217, 219 and 233.) Indeed the evidence protested by No. 9 of the Assignments of Error was introduced on cross-examination (transcript, p. 177), and the admission of Exhibit 31 assigned as error in No. 12, and of Exhibit 183 assigned as error in No. 18 were with defendants' consent affirmatively expressed. (Transcript, pp. 139, 213.)

As to Assignments of Error Nos. 37 and 42, no request for the Court to give any such instructions appears in the transcript or among the exceptions. (Pp. 344-350.)

A reading of the evidence and the instructions will show an extraordinary consideration on the part of the judge of the court below of every right of defendants, and the rulings and instructions on any controverted point were particularly favorable to them.

Assignments of Error Nos. 26 and 27 are but fragments torn from their context in the body of the instructions, but even in the mutilated form set forth, they still are correct statements of law.

Assignments of Error 25, 28, 29, 30, 31 and 32 refer to instructions given and objected to generally, not that they are incorrect statements of law, but because the law relating to conspiracy was not in issue. We submit that the instructions on this point were proper and correct, and at the time of the trial defendants requested that the jury be instructed

relative to the law of conspiracy as is shown by their requested instructions Nos. 8 and 12. (Transcript, pp. 345, 347.) Besides these instructions are particularly objected to on behalf of defendant A. E. Wayland, as to whom this appeal has been dismissed.

Assignments of Error Nos. 33, 34, 35, 36, 38, 39, 40, 41 and 43 are without merit.

These requested instructions were correctly refused. All issues were properly covered by the instructions that were given. These under consideration contained, in most instances, incorrect statements of the law, in the others erroneous statements of fact, and in nearly all of them a mixture of both error of law and fact. Sometimes, as appears so notably in Assignment No. 41 (transcript, p. 449), there is an inconsistency in the different part of the same request.

By Assignments of Error 33, 34 and 43, it is sought to have the Court instruct, in effect, that the jury should return a verdict of not guilty, unless they found beyond a reasonable doubt that both the Michel and Empire properties were worthless, and that the fact as to whether or not they were worthless depended upon the opinion of experts and that defendants could not be convicted on the opinion of an expert. On this point argument is made that the only basis of the fraud charged against defendants depended upon whether or not these were coal properties.

A careful reading of the indictment will show that the representations in relation to whether or not there was coal on these properties is only one of many

misrepresentations made by defendants. Besides, there were many distinct and particular representations made as to these claims, which were not true: For instance, the Michel was represented as having a twenty-foot vein of coal, when in fact no coal vein had ever been disclosed. The Empire was represented as containing millions of tons of coal, and that defendants believed it to be more valuable than the Crown property. (Ex. 80, p. 382, 383; Ex. 76, p. 381. Transcript, pp. 141, 142, 118, 119, 286, 287, 332. Ex. 146, p. 402; Ex. 107, p. 387. Transcript, pp. 185, 243, 245, 152, 156, 143, 274, 251, 252, 253.)

To show that the defendants did not believe these assertions, the Government expert, Mr. House, by careful tabulations made from the books of the defendants, showed that they disposed of practically all of their Empire stock, but retained their Crown stock.

According to this showing, defendants, on January 1, 1912, retained among their holdings of Crown stock 399,266 shares, but on the same date held only 50,500 shares of Empire stock. (Transcript, pp. 176-199.)

In this connection, as a conclusive proof that defendants themselves did not believe the representations they were making, that their Empire stock was more valuable than Crown stock, we call the Court's attention to a letter written from one defendant to the other (Exhibit No. 245, transcript, p. 421), which concludes with the following significant paragraph:

"Notwithstanding these problems and surmises, let us sell coal stock—Crown, Michel, or any other kind, but above all—Empire."

Further, it conclusively appears from the evidence that the defendants were not innocent lambs, misled by the opinion of experts; indeed, it would appear that the use of the experts was only an additional scheme to mislead such prospective purchasers as could not be misled by their own statements. They secured these properties in the year 1905, and during 1906 were engaged in stock-selling campaigns. The opinions of the experts, behind which they now seek to hide, were not given until July, 1907, yet among the Exhibits we find such letters as Exhibit 80, dated April 6, 1906, in which, speaking of the Michel, it is said:

“Found coal in almost every place. * * *
I see enough to convince me that we could show any
number of veins in this gulch. * * * I believe
there is almost an unlimited amount of coal underlying
this property.”

AS TO ASSIGNMENTS OF ERROR 35, 36, 38, 39 AND 40.

These requested instructions relate to the letters set forth in the first and second counts of the indictment, and it is contended by defendants that in order to make the sending of a letter obnoxious to the law, it must bear upon its face some matter of a nature calculated to be effective in carrying out the scheme to defraud. This is not the law.

“It is enough if, having devised a scheme to defraud, the defendant, with a view of executing it, deposits in the post-office letters which he thinks may assist in carrying it into effect, although in the judgment of the jury they may be absolutely ineffectual therefor.”

Durland v. U. S., 161 U. S., 315.

Lemon v. U. S., 164 Fed., 958.

Gould v. U. S., 209 Fed., 735.

But taking the letters in connection with the rest of the evidence, it is too plain for argument that they were mailed in furtherance of, and in the attempt to carry out, the fraudulent scheme heretofore devised by defendants. The letter, Exhibit 185, to Walter J. Woods (transcript, p. 410), and the other letters like it which were sent out, show on the face, that they were sent in furtherance of the design and purpose of controlling the corporations, which is one of the allegations of the indictment conclusively established by proof.

As to the letter written to John Neiderer, Exhibit No. 183, the transcript does not show whether he received treasury stock of the corporation or personal stock of the defendant for his money. But in any event, by this letter he was induced to buy stock in the Empire, which defendants had represented to him to be valuable, but which was valueless, and if defendants did not receive all the benefit of the money by transferring to him their personal stock, they received the benefit of the commissions they were getting from selling it. In any event, they profited and Mr. Neiderer was defrauded of his money by defendants, through the instrumentality of this letter and as a result of their scheme to defraud.

IN CONCLUSION.

We think the evidence shows that the defendants deliberately entered into a scheme to take advantage of the public interest in a great commodity—coal. That they induced hundreds of men and women to part with thousands of dollars to purchase shares of stock which they knew to be practically worthless.

We also feel safe in saying that it was apparent from the testimony that defendant Belden was the master mind in their schemes to exploit the public. And we have the honor to respectfully submit that no error was committed in the trial of this case, that the conviction was right and the judgment should be affirmed.

FRANCIS A. GARRECHT,
United States Attorney.

In the United States
Circuit Court of Appeals
for the Ninth Circuit

RUSSELL G. BELDEN and
A. EUGENE WAYLAND,
Plaintiffs in Error

vs.

THE UNITED STATES OF
AMERICA,
Defendant in Error

No. 2517

PETITION FOR REHEARING.

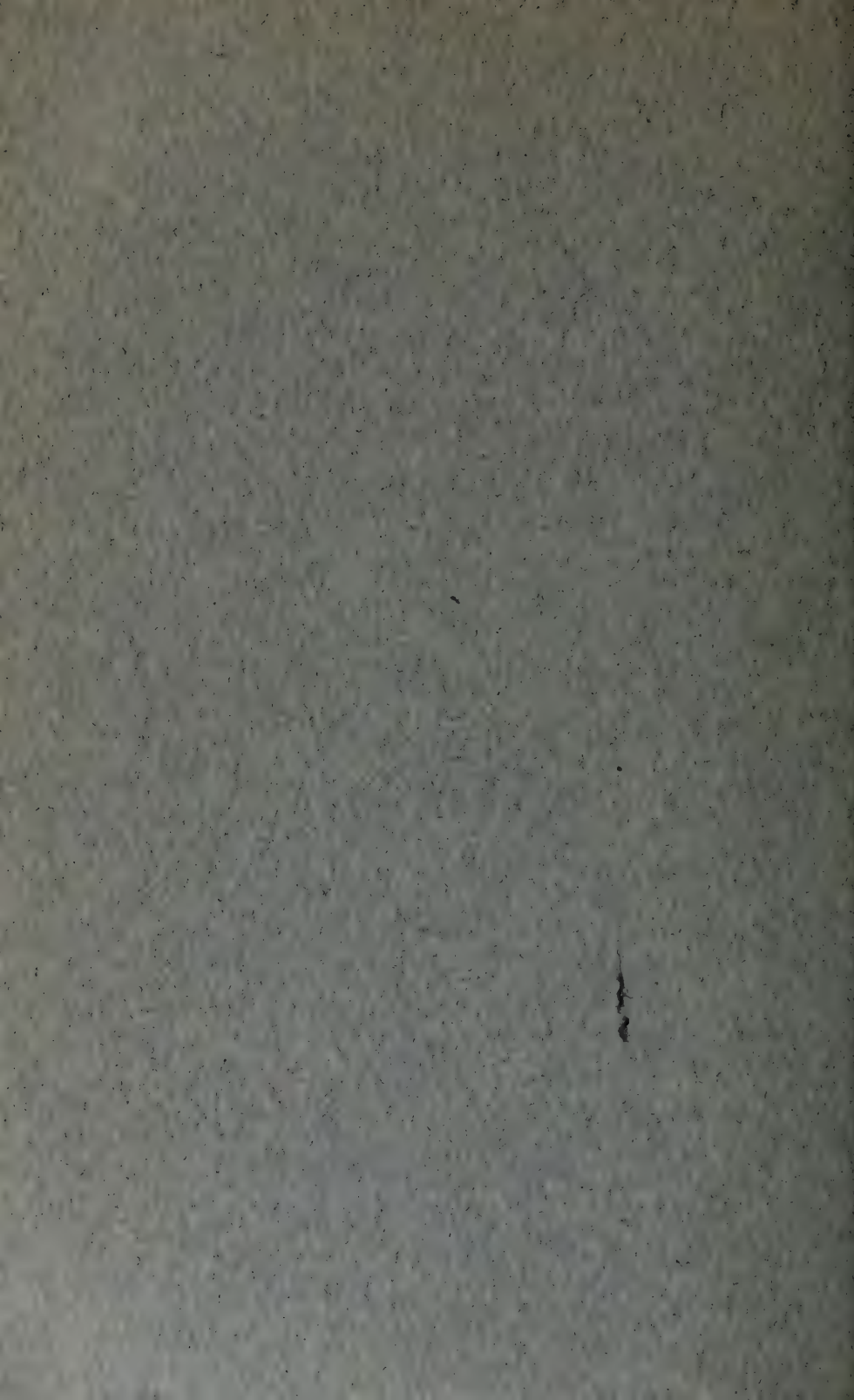
F. C. ROBERTSON,
FRED MILLER,
Attorneys for Russell G. Belden.

Filed

JUL 12 1915

F. D. Monckton,

Clerk.



In the United States
Circuit Court of Appeals
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RUSSELL G. BELDEN and A. EUGENE WAYLAND, <i>Plaintiffs in Error</i>	}	<i>No. 2517</i>
<i>vs.</i>		
THE UNITED STATES OF AMERICA, <i>Defendant in Error</i>		

PETITION FOR REHEARING.

F. C. ROBERTSON,
FRED MILLER,
Attorneys for Russell G. Belden.

Comes now Russell G. Belden, plaintiff in error, and moves the court for a rehearing and that the decision and judgment rendered in the above entitled cause on the 26th day of May, 1915, be set aside and reversed, for the following reasons:

I.

Error in denying or overruling the exception and assignment challenging the sufficiency of the indictment and especially upon the question of failure of indictment to charge a conspiracy.

II.

Error in overruling assignment of error on refusal to grant defendants a separate trial.

III.

Error in holding there was no error in refusal of court to give an instructed verdict for defendant.

IV.

Error in not sustaining assignments based on question as to whether representations made by defendants were not merely expressions of opinion and not statements of a fact.

V.

Error in overruling assignments directed to court's instructions.

VI.

Error in not setting aside judgment of conviction.

ARGUMENT.

Defendant seems to have been peculiarly unfortunate in failing to impress upon the court the strength of the position which he takes relative to some of the important phases of his case.

We shall first address ourselves to the indictment. We contended in our brief and oral argument that it was necessary to charge a conspiracy. The opinion challenges this position and cites three cases to sustain its position. We shall endeavor to show that the authorities cited in the opinion do not sustain the opinion. It is first insisted that there is a difference between Sec. 215 P. C. and Sec. 5480 R. S. The only difference is that under the old statute they must have intended to use the mails. It does not change the law of conspiracy either as a substantive crime or rule of evidence. *Stokes vs. U. S.*, 157 U. S. 187, is relied on to differentiate the old and recent statutes, but cannot be considered as an authority in this case, because the indictment charged the defendants with a conspiracy under Sec. 5440, to commit the offense de-

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scribed by Sec. 5480 R. S. Sec. 5440 defines a conspiracy against the United States. The case of *Wilson vs. U. S.*, 190 Fed. 427, was a case where the indictment was under Secs. 5480 and 5440.

The main question upon which we desire to direct the court's attention in this petition, is relative to the following from the opinion:

“Nor is it essential in offering proof respecting the existence of a conspiracy with relation to a scheme to defraud, and the use of the mails in furtherance thereof, that such conspiracy be alleged in the indictment. It is a common thing to have the question arise whether one defendant is bound by the statements and acts of another, or of persons not even connected by indictment with the offense charged, and the constant ruling has been that, if there has been a joint contrivance, or joint participation, with a common purpose, the acts and statements of the one, while engaged in carrying into effect the common purpose, are evidence against the other, and this without the necessity of alleging conspiracy in the commission of the offense. *Fitzpatrick vs. United States*, 178 U. S. 304, is illustrative, etc.”

We will refer briefly to the *Fitzpatrick* case. The defendants were jointly charged with the murder of Samuel Roberts, with a revolver, which the defendants had and held in their hands, etc. While we question the ability of a pleader to charge three men with murdering another with one revolver, yet

this one succeeded, and the sufficiency of the indictment, on that ground, was not questioned. Separate trials were granted. F. was convicted and sued out a writ of error to the Supreme Court of the United States. This case is cited by the distinguished Judge who wrote the opinion in this case, as authority that the statement of one defendant is admissible to fasten a crime on a co-defendant without either alleging or proving a conspiracy. Testimony as to alleged acts of co-defendant were admitted. Of this the court said:

“Had the statement of Corbett, that he was shot, and inquiring for a doctor, tended in any way to connect Fitzpatrick with the murder, it would doubtless have been inadmissible against him upon the principle announced in *Sparf vs. U. S.*, 156 U. S. 51, that statements made by one or two joint defendants in the absence of the other defendant, while admissible against the party making the statement, are inadmissible against the other party. In this case declarations of Hansen connecting Sparf with the homicide there involved, tending to prove the guilt of both, and made in the absence of Sparf, were held inadmissible against the latter. This is a familiar principle of the law; * * *.”

We contend that two persons could not be charged jointly with using the mails to defraud without charging in the indictment a conspiracy and establishing it by the evidence. The motion

for a separate trial was denied because the government was evidently proceeding upon the theory of a conspiracy. The government never attempted to establish a conspiracy. Nevertheless, acts of one, remote from the other, were admitted as evidence of guilt. The court instructed fully upon the question of conspiracy, and told the jury what evidence was to be considered and what was not. We contended at the trial, and now, that there was not even a scintilla of evidence to establish a conspiracy. The writer of the opinion in this case disposed of our contention on appeal as follows:

“It is not essential that it contain allegations of conspiracy, but it was altogether proper to charge the jury respecting the subject, if the evidence offered tended to show that a conspiracy really existed in relation to operations to defraud.”

We will consider briefly whether there is any authority to sustain this position. We have shown that the cases cited in the opinion on the sufficiency of the information do not so hold.

“When the fact of a conspiracy has been proved, * * * the acts and declarations of one co-conspirator in furtherance of, * * * are admissible in evidence against his associates.” VI Enc. of Law, p. 866.

The evidence not being admissible until the con-

spiracy is established, we then must ascertain whether an element not charged in the indictment is admissible in evidence.

Mr. Elliot in his work on Evidence, Vol. 4, Sec. 2939, says:

“The principle on which the acts and declarations of other conspirators, and acts done at different times, are admitted in evidence against the persons prosecuted is, that, by the act of conspiring together, the conspirators have jointly assumed to themselves, as a body, the attribute of individuality, so far as regards the prosecution of the common design, thus rendering whatever is done or said by any one, in furtherance of that design, a part of the *res gestae*, and, therefore, the act of all.”

If an attempt is made to charge a conspiracy under 5440 it would not be contended but what a conspiracy must be charged. Nor why not if there is a conspiracy to commit any other crime? As a rule of evidence we have seen that a statement of one defendant out of the presence of another is inadmissible. It is made admissible if a conspiracy is established, and then only. It will doubtless be said that the defendants are not charged with conspiracy to commit this act, but with the act itself. The answer is that if they were not in a conspiracy they could not be joined, except where they aided or abetted. As was shown

in the original brief, they must allege who was the accessory.

State vs. Gifford, 19 Wash. 464.

State vs. Beebe, 66 Wash. 463.

These two cases hold that where one person is charged as a principal and co-defendant as accessory the statements and evidence against one were not admissible against the other. In the last case, a large number of authorities are cited. We fail to find any case in point from the Federal Courts, but it appears too plain for argument that what is charged is merely overt acts. It is not necessary to charge overt acts in an indictment for conspiracy, but to also include the offense which was the product of the conspiracy the acts must be stated. One could not conspire with himself. Anything one defendant says or does is admissible against him if it shows a motive or guilt. But anything any one else says is not admissible against him. That is the situation in this case. Two defendants are indicted. No charge of confederating together. As far as the indictment goes, they are each innocent of the other's acts, therefore, the acts or statements of one are not admissible against the other.

156 U. S. 51; 178 U. S. 304, *supra*.

This is not technical, for it goes to the very foundation of criminal pleading. The indictment did not advise the defendants what they were to meet or what they might expect. The rule of conspiracy is the genesis of the admission of the acts and statements of one defendant against the other and taking it out of the rule of *res gestae*. Certainly it is not fair to hold there is magic in this particular statute sufficient to modify an ancient rule of evidence.

CONSPIRACY NOT ESTABLISHED.

A reference to the exhibits in the case beginning on page 360 of transcript, will show the Int. Dev. Co. was incorporated in April, 1905; the Michel in Nov., 1905, and the Empire later. There is no evidence in the record preceding these organizations except the R. G. Belden Co., and there is no claim made as to its inception being fraudulent. All of the other evidence is subsequent, and relates to matters occurring afterwards. In other words, the government did not introduce any evidence showing any irregularities in the formation of either of the companies. The letters upon which the government relied were letters written mostly within the statute of limitation. These letters

were written some by one defendant, some by another. None of them antedated the date when the different corporations were formed. All at least, two to five years, afterwards. Plaintiff's Exhibit 32, pg. 367-8-9-70. Plaintiff's Exhibit 69, pg. 374, Jany. 3d, 1907. Plaintiff's Exhibit 70, pg. 379, Dec. 8, 1906. These letters and exhibits were chiefly between the defendants and different members of the corporations or had to do with individual sales or transactions. On page 336, the court instructed the jury that if the defendants "having devised a scheme to defraud, defendants with a view of * * *." It will be seen the court took the view that the government must establish its scheme, and we take it also its conspiracy, without recourse to the letters set out in the indictment. They of themselves were innocent enough and we fail to find anything in the entire record which would show any fraudulent scheme.

The government admitted there was a deposit of coal on the Crown. Defendant's experts testified that same veins were under the other two. Defendant requested an instruction on this subject. Assignment No. 33, p. 446. It was refused. Instead the court instructed, pg. 338:

"The defendants are not on trial for evolv-

ing or devising an improvident scheme, even though you should find their plan to be such, nor are they on trial for mere errors of judgment."

This court disposed of this assignment on the theory the court fully instructed upon the subject. This was the only instruction and we don't think related to this subject at all. It had to do more with the failure of their corporations than whether the coal veins were under these two claims. The Crown is admittedly a good mine, but it has not yet shipped any coal.

We have endeavored to be brief in the presentation of this petition. We have not reiterated the contentions made in the original brief relative to failure of indictment to directly charge any act, and being merely by way of recital. We call attention to pages 12 and 13 of brief and subsequent. Also to that portion of the brief wherein it is urged there could not be a crime proven, for all of defendant's experts had advised them that coal underlay the Michel and Empire.

On the facts we desire to again insist that nothing in the nature of a conspiracy was established, neither was the evidence of alleged fraudulent acts sufficient to sustain a conviction. The opinion disposes of the facts by a mere reference. If an

attempt were made to justify the conviction by a recital of the facts, it would be found, we apprehend, a very difficult task. As we view it, the government merely threw into the case a lot of exhibits, the product of defendants or their officers, having no relation to the counts in the indictment and called it a case.

We respectfully submit the defendant has not been legally convicted and is entitled to a re-hearing.

F. C. ROBERTSON,
FRED MILLER,
Attorneys for Russell G. Belden.

I, FRED MILLER, one of the attorneys for the above named plaintiff in error, hereby certify that in my judgment the above and foregoing petition for a re-hearing is well founded and that it is not interposed for delay.


.....

United States
Circuit Court of Appeals
For the Ninth Circuit.

SHERMAN, CLAY & COMPANY, a Corporation,
Appellant,

VS.

SEARCHLIGHT HORN COMPANY, a Corpora-
tion,
Appellee.

Transcript of Record.

Upon Appeal from the United States District Court for the
Northern District of California, Second Division.

Filed

FEB 13 1915

F. D. Monahan,
Clerk.

United States
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SHERMAN, CLAY & COMPANY, a Corporation,
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Names and Addresses of Attorneys.

NICHOLAS A. ACKER, Esq., Attorney for Appellant,

Foxcroft Building, San Francisco, California.

JOHN H. MILLER, Esq., Attorney for Appellee,

Crocker Building, San Francisco, California.

In the District Court of the United States for the Northern District of California, Second Division.

SEARCHLIGHT HORN COMPANY,

Complainant,

vs.

SHERMAN, CLAY & COMPANY,

Defendant.

Bill of Complaint for Infringement of Patent.

To the Honorable the Judges of the District Court of the United States for the Northern District of California, Second Division, Sitting in Chancery:

The Searchlight Horn Company, a corporation created and existing under and by virtue of the laws of the State of New York and having its principal place of business in the city of New York in said State, complainant, brings this its bill of complaint against Sherman, Clay & Company, a corporation duly organized and existing under and

by virtue of the laws of the State of California, and having its principal place of business at the City and County of San Francisco, in the State of California, defendant, and thereupon your orator complains and says:

1. That at all the times hereinafter mentioned your orator was and still is a corporation organized and existing under and by virtue of the laws of the State of New York and having its principal place of business at the city of New York in the State of New York; and at all said times the defendant herein was and still is a corporation organized and existing under and by virtue of the laws of the State of California and having its principal place of business at the City and County of San Francisco, in [1*] the State of California.

2. That theretofore, to wit, on and prior to April 14, A. D. 1904, one Peter C. Nielsen a citizen of the United States residing at Greenport in the County of Kings, in the State of New York, was the original and first inventor of certain new and useful improvements in Horns for Phonographs and similar machines, more particularly described in the letters patent hereinafter referred to; that said improvements were new and useful inventions not known to or used by others in this country, nor patented or described in any printed publication in this or any foreign country before the said invention thereof by the said Nielsen, nor more than two years before the application of said Nielsen for a patent therefor hereinafter alleged, nor in public use or on sale in

*Page-number appearing at foot of page of original certified Record.

this country for more than two years prior to said application, and for which improvements no application for a foreign patent had been made or filed by him or his legal representatives or assigns in any foreign country more than 12 months prior to his application therefor and which improvements had not been abandoned by the said Nielsen.

3. And your orator further shows unto your Honors that heretofore, to wit, on April 14, A. D. 1904, said Peter C. Nielsen filed in the Patent Office of the United States an application in writing praying for the issuance to him of letters patent of the United States for said invention; that such proceedings were had and taken in the matter of said application by the officials of the Patent Office of the United States that thereafter to wit, on October 4, A. D. 1904, letters patent of the United States were granted, issued and delivered by the Government of the United States to the said Peter C. Nielsen whereby there was granted and secured to him, his heirs and assigns, for [2] the full term of seventeen years from said last named date the sole and exclusive right, liberty and privilege to make, use and sell the said invention throughout the United States of America and the territories thereof; the said letters patent were issued in due form of law in the name of the United States of America under the seal of the Patent Office of the United States, signed by the Commissioner of Patents of the United States, and bore date October 4, A. D. 1904, and were numbered 771,441, all of which together with a more particular description of the said invention will more fully ap-

pear from the said letters patent themselves, which are ready in court to be produced by your orator or a duly authenticated copy thereof.

4. That prior to the issuance of said letters patent all proceedings were had and taken which were required by law to be had and taken prior to the issuance of letters patent for new and useful inventions.

5. And your orator further shows unto your Honors that by a regular chain of assignments made in writing duly executed and acknowledged and recorded in the Patent Office of the United States, your orator heretofore, on January 4, 1907, became and ever since continuously has been and is now the sole owner and holder of the said letters patent and of all the rights, liberties and privileges by them granted and conferred throughout the United States of America and the territories thereof.

6. And your orator further shows unto your Honors that the invention covered by said letters patent and protected by the claims thereof is one of great value and utility, and your orator and its predecessors practiced the same extensively and made and sold large numbers of devices covered by said letters patent, and have expended large sums of money in introducing the same to the public and in making and selling said device, and upon each [3] one of said devices so made and sold by your orator the word "Patented" together with the date and number of said letters patent have been stamped and marked.

7. And your orator further shows unto your

Honors that heretofore, to wit, on the 9th day of May, 1911, your orator commenced an action at law in this Honorable Court against Sherman, Clay & Company, the defendant herein, and on that day filed its declaration in due form of law whereby it alleged all the facts hereinabove stated in this bill of complaint, and charged that the defendant, Sherman, Clay & Company, had infringed upon the said letters patent to your orator's great injury and damage in the sum of fifty thousand dollars, and prayed that a judgment be rendered against said defendant for said damages. That thereafter, to wit, on May 25, 1911, said defendant appeared in said action at law by its attorneys learned in the law and filed an answer denying all the allegations in the said declaration and thereafter, to wit, in due season and thirty days before the trial of said action filed a notice in writing, under section 4920 of the Revised Statutes, setting up that the said Nielsen was not the first or original inventor or any inventor of the invention described, claimed and patented in and by said letters patent, No. 771,441, but that long prior to the supposed invention thereof by the said Nielsen the thing sought to be patented by the said patent was shown, indicated, described and patented in and by certain prior patents of the United States and of Great Britain, which were specified by date and number, and that long prior to the supposed invention of said Nielsen the thing attempted to be covered by the said patent had been manufactured, used and sold by and known to others in this country, and the names and addresses of the persons alleged to

have had such prior knowledge and use and the places where the same were used were set up in detail in the said notice; that thereafter upon issues [4] so joined the said action at law came on duly and regularly for trial before the above-entitled court and a jury, which said trial commenced on the first day of October, 1912, and was completed on October 4th, 1912; that evidence was introduced by both sides and the case was fully and fairly tried on its merits and after argument by counsel on both sides was submitted to the jury for its decision; that thereupon, on the 4th day of October, 1912, said jury returned its verdict in favor of the plaintiff in said action, complainant herein, and against the defendant in said action, defendant herein, and assessed damages in favor of the plaintiff and against the defendant for the infringement aforesaid in the sum of \$3,578.00. Thereupon a judgment was duly made and entered in favor of the plaintiff and against the defendant for \$3,578.00 and the costs of suit, which said judgment has never been changed, altered or modified, but is still in force and effect.

8. And your orator further shows unto your Honors that within six years last past and also since the commencement of the aforesaid action at law, and since the rendition of the verdict and the entry of judgment therein as above recited, the defendant herein, without the license or consent of your orator, at the City and County of San Francisco and State of California, and elsewhere, has used and sold and is now using and selling horns for phonographs containing and embracing the invention described,

claimed and patented in and by the said letters patent, and particularly by claims 2 and 3 thereof; that the horns so used and sold as aforesaid by the defendant were and are known as the "Victor Phonographic Horns," and were made according to the specification of the said letters patent, No. 771,441, and contain and embrace the invention therein described, claimed and patented, and constituted and do constitute an infringement [5] upon claims 2 and 3 of the said letters patent; that the aforesaid horns and particularly the horns used and sold by the defendant since the commencement of the said action at law and since the rendition of the verdict and judgment therein were and are of the same identical design, form and construction as the horns which were held by the jury in said action at law to be an infringement upon claims 2 and 3 of the said Neilsen patent, it being a fact that since the rendition of the said verdict and the entry of the said judgment the defendant has continued to use and sell and is now using and selling the same style of horns and continuing the same infringement that it was guilty of prior thereto.

9. And your orator further shows unto your Honors that the defendant threatens and intends to continue, and, unless restrained by this Court, will continue to use and sell said infringing horns without the license or authority of your orator, and if defendant is permitted so to do your orator will suffer great and irreparable injury for which it has no plain, speedy or adequate remedy at law; that your orator has notified the defendant of the in-

fringement aforesaid and requested the defendant to cease and desist therefrom, yet nevertheless the defendant has continued after such notice to use and sell horns for phonographs containing the invention aforesaid.

10. And your orator alleges upon information and belief that the defendant has realized large gains and profits by reason of its said infringement aforesaid, the exact amount of which is unknown to your orator, and that your orator has suffered damages from and by reason of said infringement, the exact amount of which is likewise unknown to your orator. [6]

11. And your orator further shows unto your Honors that if the defendant is allowed to continue its infringement aforesaid, your orator will suffer great loss and damage, and for the wrongs and injuries herein complained of your orator has no plain, speedy or adequate remedy in the ordinary course of law, and for as much as your orator is without remedy in the premises save in a court of equity where matters of this kind are properly cognizable and relievable,

To the end that the defendant, Sherman, Clay & Company, may, if it can, show why your orator should not have the relief herein prayed (but not under oath or seal, an answer under oath and seal being hereby waived), according to the best and utmost of the knowledge, recollection and belief of its officers, full, true direct and perfect answer make to all and singular the matters and things hereinabove charged, your orator prays that the said de-

fendant may be enjoined and restrained from infringing upon the said letters patent, and particularly upon claims 2 and 3 thereof, and be decreed to account for and pay over to your orator the gains and profits realized by the defendant, and in addition thereto the damages sustained by your orator by reason of the infringement of said letters patent aforesaid together with costs of suit.

May it please your Honors to grant unto your orator the writ of injunction issued out of and under the seal of this court upon the filing of the bill of complaint provisionally and until the final hearing, enjoining and restraining the said defendant, Sherman, Clay & Company, its agents, servants, officers, clerks employees and attorneys from making, using or selling any horns for phonographs or similar instruments containing the invention described in the specification of said letters patent and claimed and patented in and by claims 2 and 3 of said letters patent and that upon the final hearing of this case said injunction be made perpetual and that your orator may have such other and further [7] relief as to your Honors may seem meet and proper and in accordance with equity and good conscience.

May it please your Honors to grant unto your orator the writ of subpoena ad respondendum directed to the defendant Sherman, Clay & Company, commanding it by a day certain and under a certain penalty to be and appear in this Honorable Court then and there to answer this bill of complaint and to stand to and abide by such orders, directions and decrees as to your Honors shall seem meet and in

accordance with equity and good conscience.

And your orator will ever pray, etc.

SEARCHLIGHT HORN COMPANY,

Complainant.

[Seal Searchlight Horn Company.]

By WILLIAM H. LOCKE, Jr.,

President.

CHARLES P. BOGART,

Secretary.

JOHN H. MILLER and

WM. K. WHITE,

Solicitors and of Counsel for Com-
plainant,

Crocker Bldg., San Francisco, Cal.

United States of America,

Southern District of New York,

City and County of New York,—ss.

William H. Locke, Jr., being duly sworn, deposes and says: That he is president of Searchlight Horn Company, Complainant in the within entitled action; that he has read the foregoing bill of complaint and knows the contents thereof; that the same is true of his own knowledge, except as to the matters which are therein stated on his information or belief, and [8] as to those matters, that he believes it to be true.

WILLIAM H. LOCKE, Jr.

Subscribed and sworn to before me this 6th day of November, 1912.

[Seal]

WILLIAM R. RUST,

Notary Public, Kings County.

Certificate filed in New York County.

No. 12,078.

State of New York,
County of New York,—ss.

I, WILLIAM F. SCHNEIDER, clerk of the County of New York, and also clerk of the Supreme Court for said county, the same being a court of record, DO HEREBY CERTIFY, That William R. Rust has filed in the clerk's office of the County of New York, a certified copy of his appointment and qualification as Notary Public for the County of Kings with his autograph signature, and was at the time of taking the annexed deposition duly authorized to take the same, and that I am well acquainted with the handwriting of said notary public, and believe that the signature to the annexed certificate is genuine.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of the said court and county, the 6 day of Nov. 1912.

[Seal]

WM. F. SCHNEIDER,

Clerk.

[Endorsed]: Filed Nov. 25, 1912. W. B. Maling,
Clerk. By J. A. Schaertzer, Deputy Clerk. [9]

*In the District Court of the United States for the
Northern District of California, Second Division.*

No. 15,623.

SEARCHLIGHT HORN COMPANY,

Plaintiff,

vs.

SHERMAN, CLAY & COMPANY,

Defendant.

**Notice of Motion for Leave to File Supplemental
Bill.**

To the Clerk of the Above-entitled Court and to
Messrs. N. A. Acker and J. J. Scrivner, Solicitors
and Attorneys for Defendant:

Please take notice that on Monday, June 15th, 1914,
at the hour of ten o'clock A. M., or as soon thereafter
as counsel can be heard, plaintiff in the above-
entitled suit will move the Court at the courtroom
thereof in the City and County of San Francisco,
State of California, for leave to file a supplemental
bill in the said suit setting up and alleging material
facts occurring after the former bill of complaint
was filed and including the judgment or decree of the
United States Circuit Court of Appeals for the
Ninth Circuit made, rendered and entered after the
commencement of the above-entitled suit determin-
ing the matters in controversy or a part thereof,
which said supplemental bill is hereunto annexed and
hereby specially referred to and by such reference
made a part hereof.

The ground of said motion is that the said supplemental bill alleges material facts occurring after the former bill was filed including the judgment or decree of the United States Circuit Court of Appeals rendered after the commencement of the suit determining the matters in controversy or a part thereof. [10]

Upon the hearing of said motion plaintiff will use, read and refer to and reply on the papers and pleadings on file in the case and the papers and pleadings on file in that certain action at law by this same plaintiff against this same defendant in the above-entitled court No. 15,326, including the mandate of the United States Circuit Court of Appeals for the Ninth Circuit filed in this court on June 8, 1914.

Dated this 8th day of June, 1914.

Yours, etc.,

MILLER & WHITE,

Attorneys, Solicitors and Counsel for Plaintiff.
[11]

*In the District Court of the United States for the
Northern District of California, Second Division.*

No. 15,623.

SEARCHLIGHT HORN COMPANY,

Plaintiff,

vs.

SHERMAN, CLAY & COMPANY,

Defendant.

Supplemental Bill.

Now comes Searchlight Horn Company, plaintiff in the above-entitled suit, and by leave of court first had and obtained makes and files this supplemental bill alleging material facts occurring after the former bill in this case was filed including the judgment or decree of a competent court rendered after the commencement of the suit determining the matters in controversy or a part thereof, and by such supplemental bill plaintiff alleges as follows:

I.

That after the entry of the judgment in this Honorable Court in the action at law of this plaintiff against this defendant, referred to in paragraph 7 of the original bill wherein it is alleged that on October 4th, 1912, a judgment in said action at law was entered in favor of plaintiff against the defendant for three thousand five hundred and seventy-eight dollars (\$3,578.00) and costs of suit, and after the filing of the bill of complaint herein, plaintiff in said action at law voluntarily remitted from the said judgment of three thousand five hundred and seventy-eight dollars (\$3,578.00) all save and except the sum of one dollar (\$1.00), and thereafter, to wit, on June 2, 1913, the above-entitled Court accepted said remission and entered an [12] amended judgment in said action at law in favor of plaintiff and against the defendant for the sum of one dollar (\$1.00) and costs of suit, but in no other respect was the said judgment in the said action at law changed, altered or modified by the above-entitled Court; that

thereafter said Sherman, Clay & Company defendant in said action at law applied for, sued out and obtained a writ of error from the Circuit Court of Appeals of the United States for the Ninth Circuit to the District Court of the United States for the Northern District of California, whereby the said judgment of this court in the said action at law was removed to the said Circuit Court of Appeals for the Ninth Circuit for review; that said writ of error came on regularly for hearing and was argued by respective counsel in the said Circuit Court of Appeals of the United States for the Ninth Circuit and after a full hearing and consideration thereof upon the merits of the case by said last-named court, that is to say, on May 4th, 1914, the said Circuit Court of Appeals made and entered its judgment and decree affirming in all respects the final judgment which had been entered in said action at law by the District Court of the United States for the Northern District of California; that thereafter, to wit, on the fourth day of June, 1914, said Circuit Court of Appeals of the United States for the Ninth Circuit issued its mandate in said suit and thereafter, to wit, on June 8, 1914, said mandate was filed and it is now of record in the District Court of the United States for the Northern District of California.

WHEREFORE, plaintiff prays for judgment and decree in its favor and against the defendant as prayed for in the original bill. [13]

Dated June 8, 1914.

SEARCHLIGHT HORN COMPANY,
Plaintiff.

By JOHN H. MILLER,
Its Attorney.

JOHN H. MILLER,
WM. K. WHITE.

Solicitors, Attorneys and Counsel for Plaintiff.

United States of America,
Northern District of California,
City and County of San Francisco,—ss.

John H. Miller, being duly sworn, deposes and says that he is the attorney of the plaintiff in the within entitled action; that he has read the foregoing Supplemental Bill and knows the contents thereof; that the same is true of his own knowledge, except as to the matters which are therein stated on information or belief, and as to those matters, that he believes it to be true.

That the plaintiff is a New York corporation and has no other agent in California than affiant.

JOHN H. MILLER.

Subscribed and sworn to before me this 8th day of June, 1914.

[Seal] GENEVIEVE S. DONELIN,
Notary Public in and for the City and County of
San Francisco, State of California.

Service of the within Notice of Motion and Supplemental Bill admitted this 8th day of June A. D. 1914.

N. A. ACKER,
Attorney for Defendant.

[Endorsed]: Filed Jun. 11, 1914. W. B. Maling,
Clerk. By J. A. Schaertzer, Deputy Clerk. [14]

*District Court of the United States, in and for the
Northern District of California, Second Division.*

SEARCHLIGHT HORN COMPANY,
Plaintiff,
vs.
SHERMAN, CLAY & COMPANY,
Defendant.

**Answer of Sherman, Clay & Co. to the Bill of
Complaint.**

This defendant reserving all manner of exceptions that may be had to the uncertainty and imperfection of the Bill of Complaint herein, comes now and answer thereto or to so much thereof as it is advised is material to be answered, and says:

I.

Respondent denies that on or prior to April 14, 1904, or at any other time, or at all, one Peter C. Neilsen, mentioned in the Bill of Complaint herein, was the original and first inventor, or the original or first inventor, of certain improvements in horns for phonographs or similar machines. Denies that the said improvements mentioned in said Bill of Complaint were new and useful or new or useful inventions, and denies that the same were not known to or used by others in this country, and denies that they were not patented or described in any printed publication in this or any foreign country before the

said alleged invention thereof by the said Neilsen, and denies that the same were not known or described in any printed publication in this or any foreign country more than 2 years prior to the said alleged application of said Neilsen for a patent therefor, and denies that the same was not in public use or on sale in this country for more than 2 years prior to the said application [15] for said alleged patent.

II.

Respondent admits that a patent for an improvement for horns for phonographs and other similar instruments was issued to the said Neilsen as alleged in paragraphs 3 and 4 of the said Bill of Complaint.

III.

Respondent denies upon its information and belief that the complainant herein is now or ever was the owner of said letters patent.

IV.

Answering paragraph 6 of said Bill of Complaint, defendant avers that it has no information or knowledge sufficient to enable it to make answer thereunto, and upon all and each of the matters contained in said paragraph 6 the complainant is required to make due and competent proof.

V.

Answering paragraph 8 of said Bill of Complaint respondent denies that within 6 years last past or since or at any time or at all it ever used or sold or that it is now using or selling any horns for phonographs containing and embracing the invention described and claimed and patented in and by said

letters patent, or any or either of the claims thereof. Denies that any of the horns for phonographs ever used or sold by this respondent were made according to the specification of the said letters patent No. 771,441, and denies that any horns used or sold by this respondent embrace or embraced the invention therein described, claimed or patented, and denies that any such horns ever used by the said respondent were infringements upon claims 2 or 3 of said letters patent.

VI.

Answering paragraph 9 of said Bill of Complaint, [16] respondent denies that since the trial of the case mentioned in the Bill of Complaint that it has ever threatened or that it intends to continue to use or sell any of said horns until the final determination of this case.

VII.

Answering paragraph 10 of said Bill of Complaint, respondent avers that it has no knowledge or information sufficient to enable it to make answer thereto, and hereby requires competent proof thereof by the complaint.

VIII.

Answering paragraph 11 of said Bill of Complaint, defendant denies that the complainant will suffer great loss, or any loss or damage, by reason of the refusal of the Court to grant an injunction herein, or by reason of any wrongs or injuries committed by this defendant, and defendant avers that complainant has a plain, speedy and adequate remedy at law to recover any royalties or damage that might accrue

to it by reason of any infringement of said patent by this defendant.

IX.

Respondent further avers as a separate and special defense to this action that the said complainant and its predecessors in interest were and are guilty of laches, and are estopped from the prosecution of this action in equity for the reasons hereinafter stated, to wit: That said complainant and its predecessors, both as individuals and corporations, resided and had their places of business in and about the City of New York in the State of New York; that the Victor Talking Machine Company is a corporation organized and existing under the laws of the State of New Jersey and has and has had its principal place of business at Camden, New Jersey, during all the times herein stated; that the Tea Tray Company is also a corporation [17] organized and existing under the laws of the State of New Jersey and has its principal place of business at Newark, New Jersey; that the Edison Phonograph Company is also a corporation organized and existing under the laws of the State of New Jersey, and has had and now has its principal place of business at Orange, New Jersey; that the American Graphophone Company is also a corporation organized and existing under the laws of the State of West Virginia, and has its principal place of business at Bridgeport, Conn.; that the Columbia Phonograph Company is a corporation organized and existing under and by virtue of the laws of the State of New Jersey, and has its principal place of business at New York City,

New York; and defendant further avers that all of said corporations and others during all the times since the year 1904, or thereabouts, have been actively engaged in the manufacture, use, sale and public distribution of the style and class of horns used and sold by this defendant and which are claimed to be infringement of said patent; that they so made, sold and distributed the same to many wholesale and retail dealers throughout the United States; that the said manufacture, use and sale, and the distribution thereof to corporations and individuals and to wholesale and retail dealers in the immediate neighborhood and adjacent cities, towns and territory of the main office of said complainant has been public, general and notorious, and that said complainant and its predecessors have during all of said time had full knowledge of such manufacture, use, sale and distribution of said devices by the entire trade engaged in that line of business.

Defendant further avers that it purchased said goods from the Victor Talking Machine Company, and that it did so purchase and sell the same in perfect good faith, and at all [18] times ignorant that it was contended or claimed by the complainant or any of its predecessors that the horns sold by the Victor Talking Machine Company and others hereinbefore mentioned were infringements of the said Neilsen patent or in violation of any rights or privileges owned or claimed by the complainant herein. Defendant further avers that it never had any knowledge or any reason to suppose that the buying, selling or using of the devices heretofore sold

by it were infringements upon any rights of the complainant herein up to the time herein stated.

Defendant further avers that by reason of the said acts of said complainant and its predecessors in interest in permitting the public in general to manufacture, sell, distribute and use such horns, with its personal knowledge and consent, not only in its immediate neighborhood but throughout the entire country, this respondent was and has been greatly misled, and by the said acts of said complainant was led to suppose and did suppose that defendant and all other persons had a perfect legal right to manufacture, buy, sell, and use said phonographic horns.

Defendant further avers that for a period of more than 8 years last past the complainant has constantly, continuously and willfully disregarded and ignored any exclusive rights that it might have, or that may have been conferred upon it by the said Neilsen and his predecessors in interest by virtue of said patent, and have knowingly and willfully, and for the purpose, as defendant is informed and believes, of silently permitting and allowing the public to become involved in extensive infringements of said patent for the purpose of ultimately collecting large royalties and damages by reason of its stale claims for the infringements of said patent. [19]

Defendant further avers that it is informed and believes, and so stated the fact to be, that this Court sitting as a court of equity should not now exercise jurisdiction to enforce by equitable proceedings any rights that the complainant may have or might have had for the alleged infringement of said patent had

they pressed their claims within a reasonable time, and that said complainant is guilty of great laches and inequitable conduct, in so delaying the enforcement of their rights, and is now estopped from maintaining suits on the equity side of this Court for injunctions against, and accountings from the alleged infringers.

X.

For a further and special defense to said action the said defendant hereby gives notice that under and pursuant to the provisions of Section 4920 of the Revised Statutes of the United States, the defendant above named, will upon the trial of the above-entitled action prove and offer evidence tending to prove the following special matters, as a defense to said action, to wit:

That the horn for phonographs or similar machines patented by said Peter C. Neilsen, No. 771,441, dated October 4, 1904, mentioned in the declaration herein and sued on in this action, had been patented, fully shown, indicated and described prior to the alleged invention or discovery thereof by the said Peter C. Neilsen, in the following letters patent of the United States and foreign countries; and the names of patentees of said letters patent and the dates of said patents and when granted are here given, to wit:

No. 8824, dated and granted Dec. 7, 1857, to Frederick S. Shirley, for an improved Design for Glassware.

No. 10,235, dated and granted Sept. 11, 1877, to [20] Edward Cairns, for improved Design for

Speaking-Trumpets.

No. 34,907, dated and granted Aug. 6, 1901, to Charles McVeety and John F. Ford, for an improved Design for a Ship's Ventilator.

No. 72,422, dated and granted Dec. 17, 1867, to George S. Saxton, for improvements in Manufacture of Corrugated Bells.

No. 165,912, dated and granted July 27, 1875, to William H. Barnard, for improvements in Lamp-Chimneys.

No. 181,159, dated and granted Aug. 15, 1876, to Charles W. Fallows, for improvement in Toy Blow-Horns.

No. 187,589, dated and granted Feb. 20, 1877, to Emil Boesch for improvement in Reflectors.

No. 216,188, dated and granted June 3, 1879, to Thomas W. Irwin and George K. Reber, for improvement in Water-Conductors.

No. 240,038, dated and granted April 12, 1881, to Nathaniel C. Powelson and Charles Deavs, for improver Reflector.

No. 274,930, dated and granted April 3, 1883, to Isaac P. Frink, for improved Reflector for Chandeliers, etc.

No. 276,251, dated and granted April 24, 1883, to Philip Lesson, for improved Child's Rattle.

No. 337,972, dated and granted Mar. 16, 1886, to Henry McLaughlin, for improved Automatic Signal-Buoy.

No. 406,332, dated and granted July 2, 1889, to James C. Bayles, for improved Pipe or Tube.

No. 409,196, dated and granted Aug. 20, 1889, to

Charles L. Hart, for improved Sheet-Metal Pipe.

No. 427,685, dated and granted May 13, 1890, to James C. Bayles, for improved Pipe-Section.

No. 455,910, dated and granted July 14, 1891, to William J. Gordon, for improved Sheet-Metal Elbow or Shoe.

No. 612,639, dated and granted Oct. 18, 1898, to James [21] Clayton, for improved Audiphone.

No. 648,994, dated and granted May 8, 1900, to Major D. Porter, for improved Collapsible Acoustic Horn.

No. 651,368, dated and granted June 12, 1900, to John Lanz, for improved Composite Metal Beam or Column.

No. 699,928, dated and granted May 13, 1902, to Charles McVeety and John F. Ford, for improved Ship's Ventilator.

No. 705,126, dated and granted July 22, 1902, to George Osten and William P. Spalding, for improved Horn for Sound Recording and Reproducing Apparatus.

No. 738,342, dated and granted Sept. 8, 1903, to Albert S. Marten, for improved Interchangeable Sound-Amplifying Means for Talking or Sound-Reproducing Machines.

No. 739,954, dated and granted Sept. 29, 1903, to Gustave Harman Villy, for Horn for Phonographs, Ear-Trumpets, etc.

British Letters Patent No. 7594, dated and granted April 24, 1900, to William Phillips Thompson, for improvements in Graphophones or Phonographs.

British Letters Patent No. 17,786, dated and

granted August, 13, 1902, to Henry Fairbrother, for improvements in Phonographs and other Talking Machines.

British Letters Patent No. 20,567, dated and granted Sept. 20, 1902, to John Mesny Tourtel for improvements in Phonographs.

That prior to the year 1894 devices fully showing and describing and indicating the alleged invention patented by the said Peter C. Neilsen, No. 771,441, dated October 4, 1904, mentioned in the declaration herein and sued in this action, has been manufactured, sold and placed into use in this country, and were known to others in this country long prior to the alleged invention and discovery thereof by the said Peter C. Neilsen, the same having been manufactured, sold, placed into use and known to the following [22] named persons, to wit:

Manufactured and sold as early as the year 1893 by the Tea Tray Company, now located at the corner of Murraray and Mulberry Streets, Newark, New Jersey.

Manufactured and sold prior to the year 1896 by the firm of Noble and Brady, located and doing business in New Britain, Connecticut.

That the manufacture and use of such devices was known to John H. B. Conger, residing at #26 Van Ness Place, Newark, New Jersey; George C. Magill, residing at #31½ South 12th Street, Newark, New Jersey; Charles J. Eichhorn, whose address is corner Murraray and Mulberry Streets, Newark, New Jersey; Peter Shoeppler, residing at #48 N. Arlington Avenue, East Orange, New Jersey;

Thomas H. Brady, residing at #124 Washington Street, New Britain, Conn.; William J. Noble, residing at #109 Serton Street, New Britain, Conn.; August Doig, residing at #26 South High Street, New Britain, Conn.; James Conelly, residing at #164 Beaver Street, New Britain, Conn.; and that the devices manufactured and sold and known to the above-mentioned parties were used by the New Jersey Phonograph Company, whose place of business was at the corner of Orange and Plain Streets, in the City of Newark, New Jersey; North American Phonograph Company of #30 Park Place, New York City, New York, and by others whose names, addresses and places of business are unknown at this time, but when ascertained this defendant craves leave to incorporate in the notice herein given as to manufacture, sale, use and knowledge of the alleged invention contained in the letters patent in suit.

WHEREFORE defendant prays that the motion for a preliminary injunction herein be denied, and that the Bill of Complaint be [23] dismissed for want of equity.

N. A. ACKER,

J. J. SCRIVNER,

Sol. and Attorneys for Defendant.

N. A. ACKER,

J. J. SCRIVNER,

Of Counsel.

United States of America,
Northern District of California,
City and County of San Francisco,—ss.

Ferdinand W. Stephenson, being first duly sworn

deposes and says: That he is an officer, to wit: Secretary of the Sherman, Clay & Company, a corporation, the defendant named in the foregoing Answer; that he has read the said Answer and knows the contents thereof, and that the same is true of his own knowledge except as to the matters which are therein stated on information and belief, and that as to those matters he believes it to be true.

[Seal Sherman, Clay & Co.]

FERDINAND W. STEPHENSON.

Subscribed and sworn to before me this 31st day of December, 1912.

[Seal]

A. K. DAGGETT,

Notary Public in and for the City and County of San Francisco, State of California.

Due service and receipt of a copy of the within Ans. is hereby admitted this 2d day of January, 1913.

MILLER & WHITE,

Attorney for Plaintiff. [24]

[Endorsed]: Filed Jan. 4, 1913. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [25]

In the District Court of the United States for the Northern District of California, Second Division.

IN EQUITY.—No. 15,623.

SEARCHLIGHT HORN COMPANY,

Plaintiff,

vs.

SHERMAN, CLAY & COMPANY,

Defendant.

Notice of Motion (for Injunction).

To Searchlight Horn Company and Messrs. Miller & White (Its Attorneys), Crocker Building, San Francisco, California.

Gentlemen: You will please take notice that on Monday, the 10th day of August, 1914, at 10 o'clock in the morning, or as soon thereafter as counsel can be heard, defendant will move this Court at the courtroom thereof, in the City and County of San Francisco, State of California, for an order enjoining you, the said Searchlight Horn Company, from the further prosecution of the above-entitled infringement suit brought against this defendant, Sherman, Clay & Company, and from bringing or instituting within the jurisdiction of this Court any other suit or suits of a similar nature for infringement against dealers of the Victor Talking Machine Company from whom the alleged infringing Phonographic Horns were purchased, and against which said Victor Talking Machine Company there is now pending in the District Court of the United [26] States for the District of New Jersey, Equity Suit No. 394 brought by the plaintiff herein—Searchlight Horn Company against said Victor Talking Machine Company for infringement of United States Letters Patent 771,441, the said letters patent being the same as the letters patent involved in the present suit and alleged to have been infringed by the defendant herein; the injunctive order herein asked for to continue and remain in full force and effect until accounting is had on any judgment which may be

obtained against the Victor Talking Machine Company in the above-mentioned Equity Suit No. 394 now pending in the District Court of the United States for the District of New Jersey.

Said motion is based, and I will rely at the hearing thereon upon the records and proceedings in this case, the affidavits of Andrew G. McCarthy, Charles K. Haddon, the accompanying Petition of Defendant herein, and the certified Bill of Complaint and Answer on file in said Equity Suit No. 394, now pending in the District Court of the United States, for the District of New Jersey, between the Searchlight Horn Company and the Victor Talking Machine Company, and the records of this court in that certain action at law No. 15,326, entitled Searchlight Horn Company vs. Sherman, Clay & Company.

SHERMAN, CLAY & COMPANY,

By N. A. ACKER,

Its Solicitor.

San Francisco, California, July 25, 1914. [27]

*In the District Court of the United States for
the Northern District of California, Second
Division.*

IN EQUITY—No. 15,623.

SEARCHLIGHT HORN COMPANY,

Plaintiff,

vs.

SHERMAN, CLAY & COMPANY,

Defendant.

**Defendant's Petition to Enjoin Prosecution of Suits
for Infringement.**

To the Honorable the Judges of the Above-entitled
Court:

Comes now the above-named defendant and gives
this Honorable Court to understand and be in-
formed:

I.

That the above-entitled suit is for the infringement
of United States Letters Patent No. 771,441, particu-
larly claims 2 and 3 thereof, by defendant, Sherman,
Clay & Company, who is a dealer in musical instru-
ments and musical supplies generally, for phono-
graphic horns, which the said defendant as a dealer
purchased from the Victor Talking Machine Com-
pany, the said phonographic horns alleged to be an
infringement of the letters patent in suit herein,
having been purchased from the said Victor Talk-
ing Machine Company for use in connection with
talking machines sold by musical dealers generally.

II.

That the present suit was filed in this court on or
about the 25th day of November, 1912, and a pre-
liminary injunction prayed for, which injunction
was granted on the 29th day of April, 1913. That
an appeal was duly taken to the United States Cir-
cuit Court of Appeals for the Ninth Circuit from
the order of this Court granting the said preliminary
injunction, which [28] appeal was argued before
the said Court of Appeals and submitted to said
Court. That on the 4th day of May, 1914, the said

Court of Appeals rendered its decision affirming the decree of this Court in the granting of the said preliminary injunction.

III.

That during the pendency of the said appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the granting of the said preliminary injunction, and long prior to the rendition of any decision by the said Circuit Court of Appeals relative thereto, the plaintiff herein—the Searchlight Horn Company, commenced an action in Equity Suit No. 394 in the District Court of the United States for the District of New Jersey, against the Victor Talking Machine Company for infringement of the said United States Letters Patent No. 771,441, in suit herein, charging in and by its Bill of Complaint that the said Victor Talking Machine Company had infringed the said letters patent and more particularly claims 2 and 3 thereof, by the sale of phonographic horns of the same kind and identical with those supplied by the said Victor Talking Machine Company to the said defendant herein, Sherman, Clay & Company, and complained of as being an infringement of the letters patent in suit herein.

IV.

That in and by the Bill of Complaint filed in said Equity Suit No. 394, now pending in the said District Court of the United States for the District of New Jersey, prayer was made that the defendant to said action—the said Victor Talking Machine Company, be decreed to account for and pay over

unto the plaintiff thereto—Searchlight Horn Company, all the gains and profits realized by the said defendant by reason of said alleged infringement of said letters patent No. 771,441. [29]

V.

That the defendant, Victor Talking Machine Company, duly filed its Answer to the Bill of Complaint, re Equity Suit No. 394, and the said suit has been at issue ever since about the 13th day of September, 1913.

VI.

That in connection with said suit No. 394, the defendant thereto, the Victor Talking Machine Company, has taken its testimony under stipulation herein that the testimony taken by the defendant to the present suit may be used on behalf of the said defendant to Equity Suit No. 394, now pending in the District Court of the United States for the District of New Jersey, and the said Equity Suit No. 394 is now ready for hearing.

VII.

That your petitioner, the defendant herein, Sherman, Clay & Company, is one of the many hundred of dealers of the Victor Talking Machine Company, located and doing business throughout the territory of the United States of America, and shows unto your Honors that all of the phonographic horns complained of herein as infringement of the said letters patent in suit herein are phonographic horns purchased by the said defendant, Sherman, Clay & Company, from the said Victor Talking Machine Company, defendant to said Equity Suit No. 394.

VIII.

That your petitioner, defendant herein, Sherman, Clay & Company, is not engaged at this time and has not been for a long time past engaged in the selling of the said alleged infringing phonographic horns.

IX.

That in addition to the present suit pending against the defendant herein, one of the dealers of the Victor Talking [30] Machine Company, there is now pending in the District Court of the United States for the Southern District of California, Southern Division, action at law—#1625, brought by the plaintiff herein against Wiley B. Allen & Company, another dealer of the said Victor Talking Machine Company, said suit alleging infringement by said Wiley B. Allen & Company of the letters patent in suit herein for the same identical horns herein complained, and the same identical horns sold by the said Victor Talking Machine Company and alleged in said pending Equity Suit No. 394 to be an infringement of the letters patent herein.

X.

That the said plaintiff, Searchlight Horn Company has threatened and still threatens and continues to threaten to bring many other similar suits against dealers of the Victor Talking Machine Company, defendant to said pending action No. 394, and that unless restrained by this Honorable Court, will bring such suits and will prosecute the same, and will continue to prosecute the suits heretofore brought against said dealers.

XI.

That the said defendant to pending Equity Suit No. 394, Victor Talking Machine Company, is financially able to respond on an accounting to any judgment which may be rendered against it in connection with said pending suit No. 394, and whereas all of the Phonographic Horns complained of in the present case and equally so in the pending case against Wiley B. Allen & Company, are Phonographic Horns sold by the said Victor Talking Machine Company; they are each and all of them subject to said accounting on any judgment which may be obtained in said pending Equity Suit No. 394, and are all subject [31] to any such accounting and must be accounted for by the said Victor Talking Machine Company in said suit No. 394.

XII.

That the defendant herein is not a manufacturer of the Phonographic Horns herein complained of as an infringement of said letters patent in suit herein, but on the contrary, is merely one of the many dealers of the Victor Talking Machine Company, and procured from said company each and all of the Phonographic Horns herein complained of.

XIII.

That your petitioner, Sherman, Clay & Company shows unto your Honors that the plaintiff herein, Searchlight Horn Company, is not at this time engaged in the manufacture and sale of the Phonographic Horns covered by the letters patent in suit herein and has not been so engaged since the month of May, 1908.

XIV.

That your petitioner, Sherman, Clay & Company, shows unto your Honors that the plaintiff herein, the Searchlight Horn Company, when engaged in business prior to the month of May, 1908, manufactured and sold its patented Phonographic Horns to dealers throughout the United States, and was not a user of the same, but that said plaintiff derived its profit, whatever the same may have been, from its patented Phonographic Horns, solely by the manufacture and the unconditional sale thereof direct to the dealers engaged throughout the United States in the handling of said goods, and that upon the satisfaction by the said Victor Talking Machine Company of any judgment which may be rendered upon an accounting obtained in connection with said Equity Suit No. 394, now pending in the District Court of the United States for the District of [32] New Jersey, the infringing Phonographic Horns sold by said Victor Talking Machine Company to its numerous dealers throughout the United States will be released from the patent monopoly, and the defendant herein and other alleged infringing dealers of the said Victor Talking Machine Company, in this circuit and elsewhere throughout the United States, will not be liable to the Searchlight Horn Company, plaintiff herein.

XV.

That if the said Searchlight Horn Company be not restrained by this Court from continuing the prosecution of the present suit, and from bringing other suits of a like nature against dealers in this circuit

of the said Victor Talking Machine Company, irreparable injury and damage will result, by the loss to the said Victor Talking Machine Company of its dealers, who, on account of the harassment, annoyance and expense occasioned by the acts of the said Searchlight Horn Company, will fall away from the said Victor Talking Machine Company, and will cease to patronize the said company in the purchase of any and all machinery and accessories of every kind and nature incident to the talking machine business, and outside of and wholly foreign to the Phonographic Horns in question herein, for your petitioner shows unto your Honors that the said Victor Talking Machine Company is a manufacturer and seller of talking machines and accessories thereto and manufactures and sells many machines and apparatus in this line which have nothing to do with and are wholly foreign to the Phonographic Horns of the alleged letters patent in suit herein.

XVI.

That your petitioner, Sherman, Clay & Company, shows to your Honors that the purpose of the said Searchlight Horn Company in the acts and course which it is pursuing and [33] threatens to pursue, is to harass and annoy dealers of the Victor Talking Machine Company, and to harass and annoy the said Victor Talking Machine Company, and to put the said company, and equally so your petitioner and dealers generally of the said Victor Talking Machine Company, to needless expense by being called upon to defend a multiplicity of suits for alleged infringement of the letters patent in suit herein.

Inasmuch, therefore, as your petitioner is without any remedy, except in a court of equity, your petitioner prays for an order enjoining the said Searchlight Horn Company, plaintiff herein, from further prosecuting the said suit above named, and from bringing any more suits of a like nature against dealers in Phonographic Horns supplied by the Victor Talking Machine Company, for the infringement of said patent in suit herein, and sold to them by the said Victor Talking Machine Company, said injunction order to be continued until rendition of the judgment of the said District Court of the United States for the District of New Jersey, and upon the Master's report on an accounting of any such judgment as may be obtained by the plaintiff, Searchlight Horn Company, in connection with said Equity Suit No. 394, now pending in said District Court of the United States for the District of New Jersey, and your petitioner further prays that your Honors issue a restraining order against the said Searchlight Horn Company in the aforesaid matters until this petition is, upon proper motion herewith accompanying, heard and determined by your Honors.

And your Petitioner will ever pray.

SHERMAN, CLAY & COMPANY.

By N. A. ACKER,

Solicitor and Counsel for Deft. [34]

City and County of San Francisco,
State of California,—ss.

ANDREW G. McCARTHY, being duly sworn, on oath says: That he is one of the managing directors of the Sherman, Clay & Company named in the fore-

going petition to enjoin prosecution of suits for infringement; that he has read the said petition and knows the contents thereof, and that the same is true of his own knowledge.

ANDREW G. McCARTHY.

Subscribed and sworn to before me this 27th day of July, 1914.

[Seal]

D. B. RICHARDS,

Notary Public in and for the City and County of San Francisco, State of California. [35]

In the District Court of the United States for the Northern District of California, Second Division.

IN EQUITY—No. 15,623.

SEARCHLIGHT HORN COMPANY,

Plaintiff,

vs.

SHERMAN, CLAY & COMPANY,

Defendant.

Affidavit of Andrew G. McCarthy.

City and County of San Francisco,
State of California,—ss.

ANDREW G. McCARTHY, of the City and County of San Francisco, State of California, being first duly sworn, deposes and says:

That during all of the times hereinafter mentioned he was and still is one of the managing directors of the above-named defendant corporation,

Sherman, Clay & Company, and as such has full access to the books of said company and is familiar with all business dealings of the said company; that as one of the managing directors he has sole charge of the Talking Machine Department of the business of the said defendant corporation; that he was at all times heretofore and is now familiar with all the business of said defendant corporation connected with said Talking Machine Department; that the said Sherman, Clay & Company was made party defendant to action at law No. 15,326, filed in this court on the 16th day of May, 1911, by the Searchlight Horn Company for infringement by the said Sherman, Clay & Company of United States Letters Patent 771,441 involved herein by the sale of Phonographic Horns identical [36] with those complained of in the present suit; that the present suit was commenced after the 4th day of October, 1912, the date of the entry of the judgment in connection with said law case No. 15,326; that a preliminary injunction was granted by this Court in the present case, from the granting of which injunction order an appeal was taken to the United States Circuit Court of Appeals, for the Ninth Circuit, and said Court rendered its opinion on the 4th day of May, 1914, affirming the order of this Court in granting the said preliminary injunction; that since the rendition of the said decision of the said United States Circuit Court of Appeals, the defendant herein has not sold nor offered for sale any of the Phonographic Horns alleged in the Bill of Complaint herein to be an infringement of plaintiff's letters patent No. 771,441;

that all of the Phonographic Horns complained of herein and complained of in said law action No. 15,326 as being infringement of said United States Letters Patent No. 771,441, are Phonographic Horns purchased by the defendant herein from the Victor Talking Machine Company, a corporation located and doing business at Camden, New Jersey, which said company has been marketing, selling and offering said Phonographic Horns complained of herein to dealers generally throughout the United States since about the year 1905, and has largely distributed the said horns throughout the United States to a large number of dealers handling such class of goods; that said sale by the Victor Talking Machine Company of the Phonographic Horns herein complained of was well known to the plaintiff herein—the Searchlight Horn Company, that the plaintiff herein, Searchlight Horn Company, was not at the time of the commencement of this suit and is not at this time, as affiant is informed and believes, engaged in the manufacture and sale to dealers of the Phonographic Horns of the letters patent in suit herein, and the [37] said Searchlight Horn Company has not been so engaged in the manufacture and sale of said patented Phonographic Horns since about the month of May, 1908.

Affiant further says that since the commencement of the present suit and long prior to the rendition of the said decision of the United States Circuit Court of Appeals affirming the decision of this Court in the granting of the before mentioned preliminary injunction in this case, the plaintiff herein, Search-

light Horn Company instituted and commenced in the District Court of the United States for the District of New Jersey, Equity Suit No. 394, in which suit the before mentioned Victor Talking Machine Company is made the party defendant; that in said mentioned Equity Suit No. 394 the plaintiff herein and to said suit charged infringement by the said Victor Talking Machine Company of the United States Letters Patent in suit herein by the sale of the Phonographic Horns complained of in the present suit as being an infringement of the said letters patent in suit; that answer was filed by defendant to said Equity Suit No. 394 on or about September 13, 1913, and ever since said case has been at issue; that in said Equity Suit No. 394 a large amount of testimony has been taken, amounting to more than six hundred pages, under a stipulation in the present case that the testimony taken herein and which at this time has been taken by defendant herein, shall and may be used as testimony in the defense of said Equity Suit No. 394, and that said Equity Suit No. 394 is now ready for hearing so far as relates to the defendant thereto;

Affiant further states that the complainant herein, Searchlight Horn Company, when engaged prior to the month of May, 1908, in the manufacture of the said Phonographic Horn of the letters patent in suit herein, derived its revenue, whatever the same may have been, by the unconditional sale of the said patented [38] Phonographic Horns so manufactured, through the usual channels of trade to dealers throughout the United States engaged in the

handling of Phonographic Horns for use in connection with Talking Machines;

Affiant further says that in and by its Bill of Complaint filed in said Equity Suit No. 394 now pending and ready for hearing in the District Court of the United States for the District of New Jersey, the plaintiff herein, and plaintiff to said suit against the Victor Talking Machine Company, asked and prayed that the said Victor Talking Machine Company be restrained and enjoined from infringing the letters patent in suit therein which are the letters patent herein involved, and be decreed to account for and pay over unto the Searchlight Horn Company, the gains and profits realized by the Victor Talking Machine Company, and in addition thereto, the damages sustained by the said Searchlight Horn Company by reason of the alleged infringement of said letters patent, together with cost of suit.

Affiant further says that the said Victor Talking Machine Company, defendant to said Equity Suit No. 394, is financially able to respond to any judgment which may be rendered against it on any accounting had and obtained by the plaintiff, Searchlight Horn Company, in said pending Equity Suit No. 394, and that whereas all the Phonographic Horns complained of in the present suit are horns supplied by the said Victor Talking Machine Company to the said Sherman, Clay & Company, a dealer thereof, they are each and all subject to any accounting which may be had in said Equity Suit No. 394, and must be accounted for in said case.

Affiant further states that the Victor Talking Machine Company is willing and well able to respond

unto the plaintiff—Searchlight Horn Company, to any and all sums which the Master [39] may find unto said plaintiff, on an accounting on any judgment in said Equity Suit No. 394 rendered against the Victor Talking Machine Company in connection with each and all of said alleged infringing Phonographic Horns.

Affiant further states that in addition to the action at law and the present equity suit brought by plaintiff, Searchlight Horn Company, against the defendant herein, dealer of the Victor Talking Machine Company, the plaintiff hereto has pending in the District Court of the United States for the Southern District of California, Southern Division, a further suit against one Wiley B. Allen & Company, a dealer of the Victor Talking Machine Company, for infringement of the letters patent herein, by the sale of the same identical type of Phonographic Horns herein complained of, and which horns involved in said mentioned action are horns supplied to the said Wiley B. Allen & Company by the said Victor Talking Machine Company.

Affiant further states that all of the Phonographic Horns referred to in the various suits before mentioned are horns supplied to the defendants thereto as dealers by the said Victor Talking Machine Company.

Affiant further says that to permit the suits herein to be continued and prosecuted at this time against dealers of the Victor Talking Machine Company will create a needless and heavy expense to the various defendants, and to this defendant, which expense is

needless at this time, inasmuch as the entire matter can be settled and adjusted before the Master on an accounting from any judgment which may be obtained against the Victor Talking Machine Company, defendant to said pending Equity Suit No. 394, and that such an accounting will dispose of the entire matter in so far as the same relates to the dealers of the Victor Talking Machine Company and give unto the plaintiff herein all that it is [40] justly entitled to for each and every of the alleged infringing Phonographic Horns supplied by the said Victor Talking Machine Company to its various dealers located throughout the United States, and for each and every of the alleged infringing Phonographic Horns sold by this defendant, Sherman, Clay & Company.

That plaintiff herein receives no revenue from the patented Phonographic Horns of the patent in suit by way of royalties under any license agreement entered into prior to the commencement of any of the suits herein mentioned, or the granting of licenses for the use of the said patented Phonographic Horns; the entire profit made by the plaintiff herein when engaged in the manufacture of said patented article being, as above stated, derived by the manufacture and outright sale of the said horns to musical dealers throughout the United States handling such class of goods.

Further affiant saith not.

ANDREW G. McCARTHY.

Subscribed and sworn to before me this 27th day of July, 1914.

[Seal]

D. B. RICHARDS,
Notary Public in and for the City and County of San
Francisco, State of California. [41]

*District Court of the United States for the Northern
District of California, Second Division.*

IN EQUITY—No. 15,623.

SEARCHLIGHT HORN COMPANY,
Plaintiff,

vs.

SHERMAN, CLAY & COMPANY,
Defendant.

Affidavit of Charles K. Haddon.

State of New Jersey,
County of Camden,—ss.

CHARLES K. HADDON, being duly sworn, deposes and says as follows:

That he is a resident of Haddonfield, County of Camden, and State of New Jersey;

That he is a stockholder in the Victor Talking Machine Company, a corporation duly organized and existing under and pursuant to the laws of the State of New Jersey; that he has been a director in said company since its incorporation, and is now Vice-President of said company and has full knowledge of the affairs of said company;

That said Victor Talking Machine Company is and always has been engaged in the manufacture and

marketing of disc talking machines and disc records of the "Gramophone" type and accessories thereto; that prior to the year 1905 said Victor Talking Machine Company sold, in connection with the talking machines manufactured by it, horns to be used upon its machines in the reproduction of sounds recorded on its disc talking machine records; that said [42] horns so sold by said Victor Talking Machine Company were of various forms and types, some of said horns conforming to those claimed by the plaintiff in the above-entitled suit to be in infringement of U. S. Letters Patent No. 771,441, granted to Peter C. Nielsen on the 4th day of October, 1904, for an Improved Horn for Phonographs or similar machines, and which said letters patent are claimed to be owned and controlled by said plaintiff in the above-entitled suit;

That the defendant, Sherman, Clay & Company, in the above-entitled suit is one of many concerns throughout the United States which market the product of the said Victor Talking Machine Company, and the horns marketed by the said Sherman, Clay & Company, and claimed by the plaintiff in the above-entitled suit to be in infringement of said letters patent No. 771,441 were horns sold by said Victor Talking Machine Company and obtained by said Sherman, Clay & Company through the usual channels of trade; that throughout the United States there are more than seven thousand concerns marketing the product of said Victor Talking Machine Company, including amplifying horns obtained from said

Victor Talking Machine Company of the same construction and arrangement as the horns obtained by said Sherman, Clay & Company from said Victor Talking Machine Company and claimed by the plaintiff in the above-entitled suit to be in infringement of said Nielsen patent No. 771,441;

That in addition to the above-entitled suit now pending in the District Court of the United States for the Northern District of California, Second Division, the said plaintiff, Searchlight Horn Company, has pending in the District Court of the United States for the Southern District of California, Southern Division, an action at law against the Wiley B. Allen Company for alleged infringement of said letters patent No. 771,441, the claim for infringement being based on the same horn or construction of horn as that claimed by the plaintiff in the above-entitled suit to be in infringement [43] of said Nielsen patent; that said The Wiley B. Allen Company is a concern marketing the products of the said Victor Talking Machine Company, and the horns claimed by the plaintiff in the said suit against said The Wiley B. Allen Company to be in infringement of said Nielsen patent No. 771,441 are horns which were obtained by said The Wiley B. Allen Company through the usual channels of trade from said Victor Talking Machine Company;

That in addition to the above-mentioned suits there is now pending in the District Court of the United States for the District of New Jersey a suit in equity, No. 394, the same being a suit brought July 29, 1913, by said Searchlight Horn Company, plaintiff herein,

against said Victor Talking Machine Company, alleging infringement by said Victor Talking Machine Company of said Nielsen patent No. 771,441, by the sale of amplifying horns for talking machines, said horns alleged to be in infringement in said suit, No. 394, pending in the United States District Court for the District of New Jersey being the same in all respects as the horns alleged in the above-entitled suit to be in infringement of said Nielsen patent;

That said defendant, Victor Talking Machine Company, in said suit No. 394, through its counsel, duly filed on September 15, 1913, an Answer to the Bill of Complaint, and said suit No. 394 has since September 15, 1913, been at issue; that said Searchlight Horn Company in said equity suit No. 394 in its Bill of Complaint therein as filed, and as is now on file, prays for a preliminary and a perpetual injunction against the said defendant, Victor Talking Machine Company, and that said defendant, Victor Talking Machine Company be decreed to account for and pay over unto said complainant, Searchlight Horn Company, the damages, profits and gains occasioned by reason of the alleged infringement of said Nielsen patent No. 771,441 in issue therein, being the same letters patent involved in the above-entitled [44] suit; that proofs and testimony have been taken by the defendant, Victor Talking Machine Company, in said Equity Suit No. 394, and that the said suit so far as relates to said defendant, Victor Talking Machine Company, is in condition to be set down for final hearing and the issues therein involved may be determined at a comparatively early date, depending en-

tirely upon the action of said Searchlight Horn Company, complainant in said suit;

That while said plaintiff in the above-entitled suit has at this time only two suits pending against dealers of said Victor Talking Machine Company, affiant is informed and believes and is advised that said plaintiff, Searchlight Horn Company, has threatened and still threatens and continues to threaten to bring many other similar suits against many of the dealers of the said Victor Talking Machine Company;

That said defendants to said suits pending in the Ninth Circuit brought by said Searchlight Horn Company are dealers of said Victor Talking Machine Company, and the acts of alleged infringement complained of in the said suits are by the sale by the said defendants of amplifying horns sold by the said Victor Talking Machine Company, defendant in said Equity Suit No. 394, now pending in the District Court of the United States for the District of New Jersey, as aforesaid; that to the best of affiant's information, knowledge and belief, unless said Searchlight Horn Company is restrained by this Honorable Court, it will bring innumerable suits within the Northern District of California against dealers within the jurisdiction of this court handling the products of said Victor Talking Machine Company and will prosecute the same, and will continue to prosecute the suits heretofore brought, as aforesaid, against the dealers of the said Victor Talking Machine Company;

That said Victor Talking Machine Company is amply able [45] to respond financially to any judgment which may be rendered against it in said

Equity Suit No. 394 now pending in the United States District Court for the District of New Jersey, and that whereas, as I am informed and believe, all of the amplifying horns complained of in the suits now pending against the defendants in the Ninth Circuit are against dealers of said Victor Talking Machine Company for horns sold by said Victor Talking Machine Company, and said horns are, as I am advised, each and all subject to such accounting, if any, as may be had and judgment rendered against said Victor Talking Machine Company in Equity Suit No. 394;

That said Searchlight Horn Company, alleged owner of said Nielsen patent No. 771,441 was not at the time of the commencement of this suit, so far as affiant is aware, engaged in the manufacture of horns or any other device or apparatus; that said Searchlight Horn Company went out of business about the month of May, 1908, as shown by the proofs in the action at law, No. 15,326, which was an action for damages brought by said Searchlight Horn Company against said Sherman, Clay & Company, based on alleged infringement of said Nielsen patent No. 771,441, in the District Court of the United States for the Northern District of California, Second Division;

That said Searchlight Horn Company derived its sole revenue, if any, from the manufacture of horns and the sale thereof *through* the usual channels of trade to dealers throughout the United States, its products, so far as relates to horns, being distributed to the users thereof through dealers or jobbers working in connection with said dealers, and the sale rev-

enue, if any, derived by said Searchlight Horn Company from said horns was by way of profits, if any, due to the sale of the said manufactured horns in the manner above alleged; [46]

That the horns handled by said Victor Talking Machine Company and complained of in the various mentioned suits as being alleged infringement of said Nielsen patent claimed to be owned and controlled by said Searchlight Horn Company are placed before the public through the various dealers in the United States marketing and handling the products of said Victor Talking Machine Company, and its profits on the said horns were derived by the sale thereof through the usual trade channels;

That affiant is advised that if said Victor Talking Machine Company satisfies any judgments, if any, which may be obtained against it in connection with said Equity Suit No. 394 now pending in the United States District Court for the District of New Jersey, the various dealers throughout the United States who have heretofore marketed, and who may now be marketing the horns complained of as alleged infringements will be released from any claim for damages in connection with the handling of the aforesaid infringing horns by said dealers, and the said defendants to the various suits now pending and above named will not be liable therefor to the said Searchlight Horn Company;

That the bringing of suits for alleged infringement against the dealers of said Victor Talking Machine Company and the prosecution thereof while there is

a suit pending, as before alleged, in said United States Circuit Court for the District of New Jersey against said Victor Talking Machine Company, will work an irreparable injury and damage to said Victor Talking Machine Company by the loss to it of its customers, who on account of the harassment, annoyance and expense occasioned by the acts of said Searchlight Horn Company will fall away from said Victor Talking Machine Company in its general business, and will cease to patronize the said company in the marketing of any of its products relative to the talking machine business and products outside of and foreign to the amplifying horns complained of as alleged infringements [47] of the said Nielsen patent, inasmuch as the Victor Talking Machine Company manufactures and markets talking machines generally, together with all accessories or supplies incident thereto, and which machines and accessories in this line have nothing to do with the amplifying horns alleged to be in infringement of said Nielsen patent No. 771,441;

That affiant believes, and therefore states, that the purpose of the said Searchlight Horn Company in the acts and course it is pursuing, and threatens to pursue, is to harass and annoy said Victor Talking Machine Company's customers and to put said customers to needless expense, and thereby destroy and break down the established business of said Victor Talking Machine Company, all of which acts will result in irreparable damage and injury to said Victor Talking Machine Company;

That, as before stated, a full and complete recovery

may be had by said Searchlight Horn Company on any judgment, if any, which may be rendered against said Victor Talking Machine Company in connection with Equity Suit No. 394 now pending in said District Court of the United States for the District of New Jersey and on any accounting, if any be decreed in the said suit, said Searchlight Horn Company can require said Victor Talking Machine Company to account for any and all horns, if any, which may be held to be an infringement of said Nielsen patent No. 771,441, marketed or sold by the said Victor Talking Machine Company to its dealers.

And further affiant saith not.

CHARLES K. HADDON.

Sworn to and subscribed before me this 24th day of July, A. D. 1914.

[Seal]

CHARLES F. WILLARD,

Notary Public.

My commission expires July 28th, 1918. [48]

*In the District Court of the United States for the
District of New Jersey.*

SEARCHLIGHT HORN COMPANY,

Plaintiff,

vs.

VICTOR TALKING MACHINE COMPANY,

Defendant.

**Bill of Complaint for Infringement of Patent No.
771,441.**

Now comes the Searchlight Horn Company, plaintiff in the above-entitled suit and files this its bill of complaint against Victor Talking Machine Company, defendant, and for cause of action alleges:

1. That the full name of the plaintiff is Searchlight Horn Company, and during all the time of the infringement hereinafter complained of, plaintiff was and still is a corporation created under the laws of the State of New York and having its principal place of business at the City of New York, in the State of New York.

2. That the full name of the defendant is Victor Talking Machine Company, and at all the times hereinafter mentioned said defendant was and still is a corporation created and existing under and by virtue of the laws of the State of New Jersey and having its principal place of business at the City of Camden, in the State of New Jersey.

3. That the ground upon which the Court's jurisdiction depends is that this is a suit in equity arising under the patent laws of the United States.

4. That heretofore, to wit, on October 4, A. D. 1904, the Government of the United States granted, issued and delivered [49] to one Peter C. Nielsen letters patent of the United States for a new and useful invention, to wit, a horn for phonographs and similar machines; that said letters patent bore date October 4, A. D. 1904, and were numbered 771,441, and granted to the said Nielsen and his heirs and assigns the sole and exclusive right to make,

use and vend the said invention throughout the United States of America and the territories thereof during the period of seventeen years from October 4, A. D. 1904; that a more particular description of the invention patented in and by said letters patent will fully appear from said letters patent which are ready in court to be produced by plaintiff or a duly authenticated copy thereof and of which profert is hereby made.

5. That heretofore, to wit, on January 4, A. D. 1907, by an assignment in writing plaintiff became and ever since has been and is now the sole owner and holder of said letters patent and all the rights thereby granted.

6. That since January 4th, A. D. 1907, plaintiff has made and sold devices covered and claimed by said letters patent and upon each of said devices has marked the word "Patented," together with the date and number of said letters patent.

7. That prior to May 9th, 1911, the Victor Talking Machine Company, defendant herein, had manufactured or caused to be manufactured a large number of phonograph horns called and styled "Victor Flower Horns," and had sold some of said horns, to wit, over 7156 thereof to Sherman, Clay & Company, a corporation created under the laws of the State of California and having its principal place of business in the City and County of San Francisco, in the State of California, to be by said Sherman, Clay & Company resold on the Pacific Coast as the distributing agent of Victor Talking Machine Company; that thereupon, to wit, on May 9, 1911, plain-

tiff herein commenced an action at law in the District Court of [50] the United States for the Northern District of California against Sherman, Clay & Company, and on that day filed its declaration whereby it alleged the issuance of said letters patent, No. 771,441, to Peter C. Nielsen and the assignment to and ownership thereof by the plaintiff since January 4, A. D. 1907, and that Sherman, Clay & Company had infringed upon claims 2 and 3 of said letters patent by the sale of said Victor Flower Horns whereby plaintiff had been damaged in a large sum, to wit: Fifty Thousand Dollars, and prayed that judgment be rendered against said Sherman, Clay & Company for said damages; that immediately after said action was commenced, Sherman, Clay & Company notified the Victor Talking Machine Company of the same and requested said last-named company to take charge of and to control and conduct the defense thereof; that thereupon, the Victor Talking Machine Company, in pursuance of said request, took upon itself and assumed full and entire charge and control of the defense thereof openly and to the knowledge of plaintiff, and afterwards, to wit, on May 25, A. D. 1911, in the name of and on behalf of Sherman, Clay & Company, filed an answer denying all the allegations of said declaration, and thereafter, to wit, within thirty days before the trial of the said action, filed a notice in writing under section 4920 of the Revised Statutes of the United States setting up that said Nielsen was not the first or original or any inventor of the thing patented in and by said letters patent, No. 771,441,

but that prior to the supposed invention thereof by the said Nielsen the thing patented had been shown, described and patented in and by certain prior letters patent of the United States and foreign countries which were specified by numbers and dates, and that prior to the supposed invention by the said Nielsen of the thing patented, the same had been made, used and sold by and was known to others in this country, and the names and residences of the persons alleged to have had such prior [51] knowledge and use, together with the places where the same was alleged to have been used, were set up in detail in the said notice; that upon the issues so joined, the said action at law came on for trial before the said District Court of the United States for the Northern District of California, and a jury of twelve men duly empaneled to try the same, which said trial was commenced on October 1, 1912, and was concluded on October 4, 1912; that evidence both documentary and oral was introduced by both sides and the case was fully and fairly tried on its merits, and after argument by counsel on both sides, was submitted to the jury for decision; that thereafter, to wit, on October 8, 1912, said jury returned its verdict in said action in favor of the plaintiff and against the defendant therein to the effect that said letters patent were good and valid in law and that defendant had infringed upon claims 2 and 3 thereof; and assessed damages for said infringement in favor of said plaintiff and against the defendant in the sum of \$3578.00; that thereupon a final judgment was duly made and entered in the said action

in favor of the plaintiff and against the said defendant, Sherman, Clay & Company, for the sum of \$3578.00 and costs of suit; that thereafter in due season, defendant in said action petitioned said Court for a new trial and after argument of counsel and due consideration of the matter by said Court said motion for a new trial was denied by the Court; thereafter the plaintiff in said action voluntarily remitted from the amount of said money judgment all of the same over and above the sum of \$1.00; that said judgment has never been otherwise changed, altered or modified, but is still in full force and effect; that at all times during the pendency of said action, the Victor Talking Machine Company, at the request and by and with the consent of Sherman, Clay & Company, and to the knowledge of the plaintiff, assumed and exercised full, complete and entire control, management and direction of the [52] defense of said action, selected, employed and paid the attorneys and counsel who conducted said defense and tried said action, and paid all the costs, charges and expenses of the defense of said action and placed itself in privity with the defendant therein as fully and completely as though said Victor Talking Machine Co. had been named and designated a party defendant therein; that all of the doings and acts aforesaid in respect of said defense by said Victor Talking Machine Co. were taken and performed openly without any secrecy or concealment and to and within the knowledge of plaintiff, whereby, as this plaintiff is informed and believes and therefore charges, said Victor Talking Machine

Company became and was and is bound and concluded by said judgment in respect of the validity of said patent and the infringement thereof as fully and completely as if the said action had been and was brought and said judgment made and entered directly against said Victor Talking Machine Company personally and by name.

8. That within and during six years last past the defendant herein without the license or consent of plaintiff, in the District of New Jersey and elsewhere, has made, used, and sold horns for phonographs in large numbers, which plaintiff alleges on information and belief to be over five hundred thousand, containing and embracing the invention patented in and by claims 2 and 3 of the said letters patent, No. 771,441, and thereby has infringed and is now infringing upon said letters patent; that the said infringing horns so made, used and sold by the defendant were and are styled "Victor Flower Horns," and were and are of the same form, design, construction and mode of operation as the horns involved in the said action at law against Sherman, Clay & Company.

9. That by reason of the infringement aforesaid, the [53] defendant has realized profits and the plaintiff has suffered damages, but the amount of such profits and damages is unknown to plaintiff and can be ascertained only by an accounting.

10. That the plaintiff has requested the defendant to desist from further infringement of said letters patent and to account to plaintiff for the damages suffered by plaintiff and the profits realized by

defendant from and by reason of said infringement, but the defendant has failed and refused to comply with said request or any part thereof, and is now extensively selling said infringing horns.

11. That the defendant threatens and intends to continue said infringement and unless restrained therefrom by this Court will continue to so infringe, whereby plaintiff will suffer great and irreparable injury, for which it has no plain, speedy or adequate remedy at law.

WHEREFORE, plaintiff prays:

First: That upon the filing of this bill a preliminary injunction be granted enjoining and restraining the defendant, its officers, agents, servants, workmen and employees, pending the suit and until the further order of the Court from making, using or selling, or threatening, or advertising or offering to make, use or sell any horns for phonographs containing the invention patented in and by said letters patent, No. 771,441, and from infringing upon said letters patent in any manner whatever or aiding or abetting or contributing to any such infringement.

Second: That upon the final hearing the defendant, its officers, agents, servants, workmen and employees, be permanently and finally enjoined and restrained from making, [54] using or selling any horns for phonographs or other machines containing the invention patented in and by the said letters patent No. 771,441, and from threatening, or advertising, or offering to make, use or sell any such horns and from infringing upon said letters patent in any manner whatever, or aiding, abetting,

or contributing to any such infringement, and that the writ of injunction accordingly be issued out of and under the seal of this court enjoining the defendant, its officers, agents, servants, workmen, and employees as aforesaid.

Third: That it be ordered, adjudged and decreed that the plaintiff have and recover from the defendant the profits realized by the defendant and the damages sustained by the plaintiff from and by reason of the infringement aforesaid, together with costs of suit and such other and further relief as to the Court may seem proper and in accordance with equity and good conscience.

Fourth: That upon the filing of this bill, the writ of subpoena ad respondendum be issued, directed to Victor Talking Machine Company, the defendant herein, commanding it to appear and answer this bill of complaint in accordance with the rules of the Court.

DUNCAN & DUNCAN and
JOHN H. MILLER,

Solicitors for Plaintiff.

FREDERICK S. DUNCAN and
JOHN H. MILLER,

Of Counsel with Plaintiff. [55]

United States of America,
Southern District of New York,
County of New York,—ss.

Wm. H. Locke, Jr., being duly sworn, deposes and says that he is president of Searchlight Horn Co., plaintiff in the within-entitled action; that he has read the foregoing bill of complaint and knows the

contents thereof; that the same is true of his own knowledge, except as to the matters which are therein stated on his information or belief, and as to those matters, that he believes it to be true.

WILLIAM H. LOCKE, Jr.

Subscribed and sworn to before me this 28th day of July, 1913.

[Seal]

JESSIE B. KAY,

Notary Public New York Co.

United States of America,
District of New Jersey,—ss.

I, George T. Cranmer, clerk of the District Court of the United States of America, for the District of New Jersey, in the Third Circuit, do hereby certify the foregoing to be a true copy of the original Bill of Complaint on file, and now remaining among the records of the said court, in my office.

IN TESTIMONY WHEREOF, I have hereunto subscribed my name and affixed the seal of the said court, at Trenton, in said District, this Twenty-fourth day of July, nineteen hundred and fourteen.

[Seal]

GEORGE T. CRANMER,

Clerk District Court, U. S.

By C. S. Chevrier,

Deputy. [56]

[Endorsed]: 8-28. #394. United States District Court, District of New Jersey. Searchlight Horn Company vs. Victor Talking Machine Company. Bill of Complaint. Miller & White, Attorneys at Law, Crocker Building, San Francisco, Cal., for Plaintiff. Filed July 29, 1913. [57]

*In the District Court of the United States, for the
District of New Jersey.*

IN EQUITY—No. 394.

SUIT ON NIELSEN PATENT NO. 771,441.
SEARCHLIGHT HORN COMPANY,

Plaintiff,

vs.

VICTOR TALKING MACHINE COMPANY,
Defendant.

Answer.

To the Honorable, the Judges of the United States
District Court, for the District of New Jersey;

The defendant, Victor Talking Machine Company, appearing by its solicitor, Horace Pettit, Esq., and answering the Bill of Complaint herein, says:

1. Defendant is without knowledge as to whether the full name of the plaintiff is Searchlight Horn Company, or during all the time of the alleged infringement complained of in the Bill of Complaint the plaintiff was and still is a corporation created under the laws of the State of New Jersey and having its principal place of business at the City of New York, in the State of New York, and calls upon the plaintiff for proof thereof.

2. Defendant admits that it is a corporation organized and existing under and by virtue of the laws of the State of New Jersey, and has its principal place of business at the City of Camden, in the State of New Jersey.

3. Upon information and belief, defendant admits

that letters patent of United States, No. 771,441 dated [58] October 4, A. D. 1904, were issued to one Peter V. Nielsen, but upon information and belief denies that said letters patent were issued in due form of law, and it is without knowledge as to whether said letters patent were delivered to anyone; and defendant, upon information and belief, avers that said letters patent were unlawfully granted and did not legally secure to the said Peter C. Nielsen, his heirs and assigns, nor do said letters patent lawfully secure to the plaintiff for the period of 17 years from October 4, A. D. 1904, or for any period or term, the sole or any exclusive right of making, using or vending the said pretended or alleged invention or improvements attempted to be set forth, described or claimed in said letters patent No. 771,441, and denies, upon information and belief, that the said Peter C. Nielsen, by virtue of said letters patent became the owner of any rights or privileges, or that the plaintiff, by virtue of said letters patent, is the owner of any rights or privileges.

4. Defendant is without knowledge and is not informed save by said Bill of Complaint, whether or not the plaintiff on January 4, A. D. 1907, or at any other time heretofore, by an assignment, in writing, or in any other manner, became and ever since has been, and is now, the sole owner and holder of said letters patent, or of any rights granted thereby, and defendant, therefore, denies the same, and calls upon the plaintiff for proof thereof.

5. Defendant is without knowledge, and is not

informed, save by said Bill of Complaint, whether or not since January 4th, A. D. 1907, the plaintiff has made or sold devices alleged to be covered and claimed by said letters patent, or that the plaintiff has marked upon each of such devices, the word "Patented," together with the date and number of said letters patent, and it, therefore, denies the same; but upon information [59] and belief, defendant avers that said plaintiff has not since in or about May, 1908, made and sold any devices alleged to be covered and claimed by said letters patent, or that defendant has marked upon any such devices the word "Patented," together with the date and number of said letters patent.

6. In answer to paragraph 7 of said Bill of Complaint herein, defendant states that prior to May 9th, 1911, that it sold talking machine horns and that some of said horns were called and styled Flower Horns, and upon information and belief, defendant states that it sold some horns for talking machines to Sherman, Clay & Co., carrying on business at San Francisco, in the State of California; but defendant denies that it sold over 7,156 talking machine horns or any horns whatsoever to said Sherman, Clay & Co. prior to May 9, 1911, in infringement of the patent in suit, and calls upon the plaintiff for proof thereof; defendant is without knowledge as to whether said Sherman, Clay & Co. is a corporation created under the laws of the State of California, and having its principal place of business in the City and County of San Francisco, in the State of California, and therefore denies the same

and calls upon the plaintiff for proof thereof, but defendant denies that the said Sherman, Clay & Co. was, prior to May 9, 1911, a distributing agent of defendant; defendant, on information and belief, states that the plaintiff herein has hitherto commenced an action at law in the District Court of the United States for the Northern District of California against said Sherman, Clay & Co., based upon alleged infringement of said letters patent No. 771,441; defendant is informed and believes that said action at law came on for trial before the said District Court of the United States for the Northern District of California before a judge and jury on or about October 1, 1912, and that said trial was concluded on or about October 4, 1912, and that the case was [60] submitted to the jury for a decision and that said jury returned its verdict in said action in favor of the plaintiff and against the defendant, and that said jury assessed damages for said infringement in favor of said plaintiff and against said defendant, Sherman, Clay & Co., in the sum of three thousand five hundred seventy-eight dollars (\$3,578.00) and costs of suit, and defendant is informed and believes that thereafter the said defendant, Sherman, Clay & Co., petitioned said Court for a new trial and said petition was denied, and after argument of counsel and due consideration of the matter by said Court, the said Court held that the evidence in the case was not sufficient to sustain said verdict rendered by said jury as to the award of damages and that said plaintiff was entitled, under the evidence, to only nominal damages of one dollar (\$1.00) and

that unless said plaintiff filed a waiver of all damages accepting nominal damages within a period of ten (10) days, said petition for a new trial would be granted, but that if said plaintiff within ten (10) days waived said damages awarded by said jury and agreed to accept only nominal damages, then said petition for a new trial would be denied, and that thereupon said plaintiff waived said damages awarded by said jury and agreed to accept only nominal damages of one dollar (\$1.00) and that an order to that effect was thereafter made and entered; defendant avers, upon information and belief, that upon said defendant's, Sherman, Clay & Co., petition for writ of error to the United States Circuit Court of Appeals for the Ninth Circuit from the judgment made and entered in said action at law, was duly granted and that said defendant, Sherman, Clay & Co., has duly perfected said writ of error and that the said cause is now pending on appeal before said United States Circuit Court of Appeals, and that the same will probably be argued during the coming fall; defendant further is informed and believes that during the month of December, [61] 1912, said plaintiff filed a suit in equity in said United States District Court for the Northern District of California, Second Division, against said defendant, Sherman, Clay & Co., based on alleged infringement of said Nielsen patent No. 771,441, and thereupon filed a motion for preliminary injunction against said defendant, Sherman, Clay & Co., as prayed for in the bill of complaint and that said motion for preliminary injunction came on for hearing

before the Court during the month of January, 1913, and that the said Court took the said motion under advisement, but did not make any decision thereupon until on or about April 30, 1913, at which time the said motion for preliminary injunction in said equity suit was granted; defendant is further informed and believes that thereafter an appeal to the United States Circuit Court of Appeals for the Ninth Circuit was duly taken from the order granting said preliminary injunction, and that pending the hearing and determination of said appeal, the writ of injunction was stayed by permission of the Court, the said defendant having filed a bond, and defendant is informed and believes, that the appeal from said order granting said preliminary injunction will likely come on for hearing during the early coming fall; defendant denies that by reason of any action taken by it in said action at law brought by said plaintiff against said Sherman, Clay & Co., or in any other proceeding or suit whatsoever, it placed itself in privity with the defendant therein as fully and completely as though said Victor Talking Machine Company had been named and designated a party defendant therein and denies that defendant became, and was, and is bound and included by the said judgment in respect of the validity of said patent and infringement thereof as fully and completely as if the said action had been and was brought, and said judgment made and entered directly against said Victor Talking Machine Company, personally and by name. [62]

7. Defendant denies that within and during the

six years last past, or at any other time it, without the license and consent of plaintiff, in the District of New Jersey, or elsewhere, has made, used and sold horns for phonographs in large numbers, or in the number of 500,000, or in any number whatsoever, containing and embracing the alleged invention attempted to be patented in and by claims 2 and 3 of said letters patent No. 771,441, or that it has infringed, or is now infringing upon said letters patent, or that it has committed, or is now committing any acts of infringement, or otherwise, in violation of rights of plaintiff under and by virtue of said letters patent; and defendant denies that the Flower Horns used and sold by it, infringed, or do infringe said letters patent No. 771,441, and defendant being without sufficient knowledge to form a belief, denies that the said Flower Horns were, and are, of the same form, design and mode of operation as the horns involved in the action at law in said suit against Sherman, Clay & Co., and calls upon plaintiff for proof thereof.

8. Defendant denies that it has realized any profits or that the plaintiff has suffered, or is suffering any damages from or due to any act or acts of infringement or otherwise in violation of any right of the plaintiff under and by virtue of said letters patent.

9. Defendant denies that the plaintiff has requested the defendant to desist from infringement of said letters patent, and to account to plaintiff for any damages that have been suffered by plaintiff, or profits that have been realized by defendant from

and by reason of any infringement of said letters patent; and defendant denies that it has failed or refused to comply with any such request, or with any part thereof, and denies that it has at any time infringed said letters patent, and defendant denies that *it now* selling, or has ever sold horns in infringement of said [63] letters patent No. 771,441.

10. Defendant denies that it threatens or intends, or has threatened or intended to continue during the pendency of this suit, or at any other time, any acts of infringement or otherwise in violation of any right of the plaintiff under and by virtue of said letters patent, and denies that the plaintiff has suffered any injury from any act or acts unlawfully committed by the defendant.

11. Defendant alleges, on information and belief, that the said letters patent are null and void, because the things patented therein or purported to be patented therein were not lawfully patentable in view of the state of the art relating to the alleged invention, and avers that the things claimed in said letters patent require for their production only mechanical skill, and did not involve or constitute invention.

12. Defendant alleges, on information and belief, that the said letters patent are null and void in that the said alleged improvements therein set forth and attempted to be claimed, or material and substantial parts thereof, were in public use or on sale for more than two years prior to the said Peter C. Nielsen's application for letters patent therefor.

13. Defendant alleges, on information and belief, that by reason of limitations placed by said Peter C.

Nielsen upon the claims of said letters patent during the prosecution of the application therefor in the United States Patent Office, said Peter C. Nielsen, and his alleged assignees, are estopped to claim for said letters patent a construction sufficiently broad to bring within them any device theretofore made, used or sold, or now being made, used or sold, or anything hereafter to be made, used or sold by the defendant.

14. Defendant further alleges, on information and [64] belief, that said letters patent No. 771,441 are invalid and void for the reason that the said Peter C. Nielsen was not the original, first or sole inventor or discoverer of the alleged improvement therein described and claimed or of any material and substantial part thereof, and that substantially the same horn for phonographs or similar machines, and all the material parts thereof, and everything alleged to be new or of invention in said letters patent No. 771,441, are clearly shown and described in and by certain patents granted or applied for prior to the alleged invention thereof by said Peter C. Nielsen or more than two years prior to his said application for patent therefor, and also in certain printed publications published prior to the alleged invention thereof by the said Peter C. Nielsen, or more than two years prior to his said application for patent therefor; and that said patents and printed publications, together with the dates of the grant and publication thereof, are as follows:

UNITED STATES LETTERS PATENT.

#	982, dated June 12, 1860,	Wyberd, (reissue)
	8,824, " December 7, 1875,	Frederick S. Shirley
	10,235, " September 11, 1877,	Edward Cairns
	12,442, " January 30, 1906,	Villy, (reissue)
	16,044, " April 14, 1885,	Bailey, (design)
	17,627, " August 16, 1887,	Carr "
	19,977, " July 1, 1890,	Miller
	26,640, " February 16, 1897,	Caldwell, (design)
	30,653, " May 2, 1899.	Littlehale, "
	34,907, " August 6, 1901,	McVeety, et al.
	72,422, " December 17, 1867,	George S. Saxton
	165,912, " July 27, 1875.	William H. Barnard
	181,159, " August 15, 1876.	Charles W. Fallows [65]
#	186,718, dated January 30, 1877,	Einig
	187,589, " February 20, 1877,	Emil Boesch
	216,188, " June 3, 1879,	Thomas W. Irwin, et al.
	240,038, " April 12, 1881,	Nathaniel C. Powelson, et al.
	274,930, " April 3, 1883,	Isaac P. Frink
	276,251, " April 24, 1883,	Philip Lesson
	320,424, " June 16, 1885,	George W. Woodward
	337,971, " March 16, 1886,	Henry McLaughlin
	362,107, " May 3, 1887	Charles R. Penfield
	406,332, " July 2, 1889,	James C. Bayles
	409,196, " August 20, 1889,	Charles L. Hart
	427,658, " May 13, 1890,	James C. Bayles
	453,798, " June 9, 1891,	Augustus Gersdorf
	455,910, " July 14, 1891,	William J. Gordon,
	491,421, " February 7, 1893,	Augustus Gersdorf
	534,543, " February 19, 1895,	Emile Berliner
	578,737, " March 16, 1897,	Philip J. Hass
	609,983, " August 30, 1898,	Wolhaupter
	612,639, " October 18, 1898,	James Clayton
	648,994, " May 8, 1900,	Major D. Porter
	651,368, " June 12, 1900,	John Lanz

#679,659,	dated July 30, 1901,	Wolhaupter
692,363,	“ February 4, 1902,	Walter C. Runge
693,460,	“ February 18, 1902,	Takaba
699,928,	“ May 13, 1902,	Charles McVeety, et al.
701,377,	“ June 3, 1902,	Norcross
705,126,	“ July 22, 1902,	George Osten, et al.
738,342,	“ September 8, 1903,	Albert S. Marten
739,954,	“ September 29, 1903,	Gustave Harman Villy
748,969,	“ January 5, 1904,	Melville
758,716,	“ May 3, 1904,	Storrs
763,808,	“ June 28, 1904,	Sturges
798,876,	“ September 5, 1905,	Conger, et al.

[66]

PRINTED PUBLICATIONS.

The Electrical World, published at New York, N. Y., article on “Berliner’s Gramophone,” pp. 255–256, issue of Nov. 12, 1887, and article of “The Improved Gramophone,” p. 80, issue of August 18, 1888.

A paper read before the Franklin Institute, May 16, 1888, on the Gramophone, by Emile Berliner, published in the Journal of the Franklin Institute at Philadelphia, Pa., June, 1888, and by Rufus H. Darby, printer, in 1894, at Washington, D. C., and many other publications describing Scott’s Phonograph of 1857.

The Metal Workers’ Pattern Book, by A. O. Kittridge, 3rd Edition, published at New York, N. Y., 1884, by David Williams, Printer.

The Metal Worker, a periodical, published at New York, September 1, 1900, pp. 50–56 inclusive thereof.

BRITISH LETTERS PATENT.

- # 7,594, dated April 24, 1900, to William Phillips Thompson.
- 22,273, dated November 5, 1901, to Walter C. Runge.
- 17,786, dated August 13, 1902, to Henry Fairbrother.
- 20,146, dated September 15, 1902, to Gustave Harman Villy.
- 20,567, dated September 20, 1902, to John Mesny Tourtel.
- 9,762, dated July 5, 1888, to Charles Adams Randall.

FRENCH LETTERS PATENT.

- #301,583, dated June 23, 1900, to Jose Guerrero.
- 318,742, “ February 17, 1902, to M. Turpin.
- 331,566, “ April 28, 1903, to Hollingworth.
- 31,470, “ March 25, 1857, to Leon Scott and certificate of addition thereto, dated July 29, 1859.
- 321,507, “ September 12, 1902, to M. Runge.

15. Defendant further alleges, on information and belief, that the alleged improvements in horns for phonographs and [67] similar machines described and claimed in said letters patent No. 771,441, and all material and substantial parts thereof were, prior to the date of the alleged invention thereof by said Peter C. Nielsen or more than two years prior to his said application for patent therefor, invented by, known to, and in public use or on sale by the following named persons and parties at the following named places, to wit:

George S. Saxton of St. Louis, Missouri, at said St. Louis, and elsewhere.

William H. Barnard of Sedalia, Missouri, at said Sedalia, and elsewhere.

Charles W. Fallows of Philadelphia, Pennsylvania, at said Philadelphia and elsewhere.

Emil Boesch of San Francisco, California, at said San Francisco and elsewhere.

Thomas W. Irwin of Allegheny, Pennsylvania, at said Allegheny and elsewhere.

George K. Reber of Pittsburgh, Pennsylvania, at said Pittsburgh and elsewhere.

Nathaniel C. Powelson of Brooklyn, New York, at said Brooklyn, and elsewhere.

Charles Deavs of New York, New York, at said New York and elsewhere.

Isaac P. Frink of New York, New York, at said New York and elsewhere.

Philip Lesson of Newark, New Jersey, at said Newark and elsewhere.

George W. Woodward of Brooklyn, New York, at said Brooklyn and elsewhere.

Henry McLaughlin of Bangor, Maine, at said Bangor and elsewhere.

Charles R. Penfield of Rochester, New York, at said [68] Rochester and elsewhere.

James C. Bayles of New York, New York, at said New York and elsewhere.

Charles L. Hart of Brooklyn, New York, at said Brooklyn and elsewhere.

Augustus Gersdorff at Bridgeton, New Jersey, at said Bridgeton, and elsewhere.

William J. Gordon of Philadelphia, Pennsylvania, at said Philadelphia and elsewhere.

Augustus Gersdorff of Washington, District of Columbia, at said Washington and elsewhere.

Philip J. Haas of Marengo, Iowa, at said Marengo and elsewhere.

James Clayton of New York, at said New York and elsewhere.

Major D. Porter of New Haven, Connecticut, at said New Haven and elsewhere.

John Lanz of Pittsburgh, Pennsylvania, at said Pittsburgh and elsewhere.

Charles McVeety of Philadelphia, Pennsylvania, at said Philadelphia and elsewhere.

John F. Ford, of Philadelphia, Pennsylvania, at said Philadelphia and elsewhere.

George Osten of Denver, Colorado, at said Denver and elsewhere.

William P. Spalding, of Denver, Colorado, at said Denver, and elsewhere.

Albert S. Martin of East Orange, New Jersey, at said East Orange and at Newark, N. J., and elsewhere.

Frederick S. Shirley of New Bedford, Massachusetts, at said New Bedford and elsewhere. [69]

Edward Cairns of Morristown, New Jersey, at said Morristown and elsewhere.

Walter H. Miller of Orange, New Jersey, at New York, N. Y., West Orange, N. J. and elsewhere.

Alexander N. Pierman of Newark, New Jersey, at West Orange, New Jersey and elsewhere.

Edward W. Meeker of Orange, New Jersey, at

West Orange, New Jersey and elsewhere.

Harvey N. Emmons of East Orange, New Jersey, at West Orange, New Jersey and elsewhere.

Arthur Collins of New York, New York, at West Orange, New Jersey and elsewhere.

John Riley of West Orange, New Jersey, at said West Orange and elsewhere.

James Burns of West Orange, New Jersey, at said West Orange and elsewhere.

Frederick S. Brown of Montclair, New Jersey, at West Orange, New Jersey and elsewhere.

C. J. Eichhorn of Newark, New Jersey, at said Newark and elsewhere.

John Sanderson of Pittsburgh, Pennsylvania, at said Pittsburgh and elsewhere.

Harry Betzler of Pittsburgh, Pennsylvania, at said Pittsburgh and elsewhere.

Leonard Terhune of Orange, New Jersey, at Newark, New Jersey and elsewhere.

George C. Magill of Newark, New Jersey, at said Newark and elsewhere.

Peter Schoepple of Newark, New Jersey, at said Newark and elsewhere.

John H. B. Conger of Newark, New Jersey, at said Newark and elsewhere. [70]

Thomas H. Brady of New Britain, Connecticut, at said New Britain and elsewhere.

August Doig of New Britain, Connecticut, at said New Britain and elsewhere.

William J. Noble of New Britain, Connecticut, at said New Britain and elsewhere.

James Connelly of New Britain, Connecticut, at

said New Britain and elsewhere.

Thomas A. Edison, Incorporated, (formerly named National Phonograph Company) a corporation organized and existing under and by virtue of the laws of the State of New Jersey and having its principal place of business at West Orange in said State at said West Orange and elsewhere.

Tea Tray Company, a corporation organized and existing under and by virtue of the laws of the State of New Jersey and having its principal place of business in Newark in said State, at Newark and elsewhere.

Noble & Brady of New Britain, Connecticut, at said New Britain and elsewhere.

New Jersey Phonograph Company, a corporation organized and existing under and by virtue of the laws of the State of New Jersey and having its principal place of business in Newark in said State at said Newark and elsewhere.

North American Phonograph Company, a corporation organized and existing under and by virtue of the laws of the State of New Jersey and having its principal place of business in Jersey City in said State at said Jersey City and elsewhere.

16. Defendant further says that it has been diligent in ascertaining and setting forth herein instances of prior knowledge, invention, public use, publication and patenting of the invention set forth and claimed in said letters patent No. 771,441, yet believes many further instances exist and prays leave to add the same when ascertained. [71]

17. Defendant alleges that for the purpose of de-

ceiving the public, the description and specification of the alleged invention filed by the said Nielsen in the Patent Office was made to contain less than the whole truth relative to his alleged invention or discovery, and that the description of the alleged invention in the specification is not in such full, clear, concise and exact terms as to enable any person skilled in the art to which it appertains to make, construct and use the same.

18. Defendant further alleges, on information and belief, that said letters patent No. 771,441, are invalid and void because the alleged invention attempted to be patented thereby was at the time it was produced and is now without utility.

19. Defendant further avers and states that the claims as issued in said letters patent No. 771,441, are not distinct, in that they do not particularly point out and distinctly claim the part, improvement, or combination which the said alleged inventor claims as his invention or discovery.

20. Defendant further alleges, on information and belief, that said letters patent No. 771,441, are invalid and void because the alleged invention attempted to be patented thereby has been abandoned to the public prior to the date of the application for said letters patent.

21. Defendant further answering the Bill of Complaint herein, and denying the validity of said patent in suit and denying that it ever has infringed or is now infringing said patent alleges that the said plaintiff and its predecessors in business were and are guilty of laches in bringing this suit, and are es-

topped by reason of such laches from the prosecution of this suit in equity, or from the prosecution of any alleged claim, demand, right or alleged cause of action of any nature or kind whatsoever alleged to arise or have arisen out of the patent in suit because, among other things, of the following facts: That on or about and [72] during the month of May, 1906, the United States Horn Company, which, defendant is informed and believes, was the predecessor of the plaintiff herein in the alleged ownership of the patent in suit, and from which plaintiff claims to have derived title and ownership in the patent in suit through its counsel, Burnham C. Stickney of New York, notified this defendant of the existence of the patent in suit, and warned this defendant against infringement of the same and demanded that this defendant promptly desist from further alleged infringement of said patent and to pay over to said United States Horn Company, all the alleged profits, gains and advantages which defendant had derived from the manufacture and sale of horns for phonographs alleged to be in infringement of said patent in suit, as well as damages which the said United States Horn Company had suffered by reason thereof, and informed the defendant that in default thereof, counsel had been instructed by said United States Horn Company to take steps to fully protect the rights of the said United States Horn Company in the premises; that this defendant thereupon had its counsel Horace Pettit, of Philadelphia, examine the patent in suit, and that said attorney, after making such examination, advised defendant that he did not

regard the patent in suit as valid and that this defendant infringed no rights of the said United States Horn Company; that no further communication of any kind whatsoever regarding the patent in suit has ever been received from the United States Horn Company, or from plaintiff, or from any alleged owner of the patent in suit, except in or about July and August, 1909, plaintiff herein offered, in certain written communication, to sell, to defendant certain United States and foreign patents for horns for talking machines alleged to be owned by plaintiff, among said patents being the patent in suit, and in said written communications plaintiff did not warn defendant that it was infringing the patent in suit or any of the patents enumerated in said [73] written communications, and made no claim whatsoever against defendant by reason of any alleged rights which the said plaintiff may have had in the said patent in suit; and except that on or about April 26, 1911, defendant received from Miller & White, attorneys for the plaintiff, Searchlight Horn Company, a letter in which it was stated that it was their contention that the "Standard Victor Horns" were an infringement upon the patent in suit, but no request was therein made that the defendant desist from the further use and sale of said horns for talking machines, and defendant, through its legal department, under date of May 4, 1911, wrote a letter to said Miller & White stating that defendant did not think that the patent in suit was infringed by the horns sold by the Victor Talking Machine Company, and further that defendant did not consider

the patent to be valid, and suggesting further that if plaintiff still found it necessary to file suit under said patent in suit, that plaintiff should bring the suit against the Victor Company, the defendant herein, instead of against one of the many thousands of dealers of the defendants throughout the United States, such as said Sherman, Clay & Co., and further advising plaintiff that defendant understood that the Searchlight Horn Company, the plaintiff herein, was located in New York City; and on May 6, 1911, defendant, through its legal department, wrote another letter to said Miller & White, suggesting that as defendant was selling horns to the dealers, that suit, if any, should be brought against the defendant, especially inasmuch as the plaintiff was a resident of an adjoining State, i. e., the State of New York; and defendant further avers that on or about May 15, 1911, this defendant received a letter dated May 9, 1911, from said Miller & White, in reply to defendant's said letter of May 4, 1911, in which said Miller & White stated, among other things, that they noted the defendant's suggestion that suit, if any, be brought against this defendant [74] directly, but that said Miller & White did not deem it advisable to pursue that course because such suit would be properly brought in the District of New Jersey, which would entail great personal inconvenience upon them and excessive costs upon their client, all of which defendant, upon information and belief, denies; and that said Miller & White further stated in said letter that they had "selected California as the battle-ground" and that that necessitated suing

a resident dealer; and defendant further alleges that the said Miller & White, attorneys for the said plaintiff herein, maintain an office in the City of New York, State of New York, at No. 2 Rector Street, and that the said plaintiff has its only place of business, if any, in said City of New York, State of New York, and further alleges that plaintiff designedly refused to comply with defendant's request that suit, if any, was to be brought by reason of the use and sale of said horns, be brought against this defendant in the District Court of New Jersey, and that this plaintiff instituted an action at law and also filed a suit in equity against said Sherman, Clay & Co., in the United States Circuit Court for the Northern District of California, Second Division, for the purpose of harassing and annoying this defendant and for the purpose of preventing a proper or full defense being interposed in said suits, and so that plaintiff might have an unfair advantage in the prosecution and trial of said action at law and said suit in equity; and defendant avers that this plaintiff by reason, among other things, of its conduct as aforesaid, and of its laches as aforesaid, should not be permitted in equity and good conscience to maintain the Bill of Complaint herein or do any further injustice to this defendant, and this defendant further alleges that this plaintiff and its predecessors have slept upon their rights, if any, arising out of the patent in suit, and further that this plaintiff does not come into this Court of Equity with clean hands.

[75]

22. And this defendant further answering the

Bill of Complaint herein, and herewith reaffirming, realleging and reaverring that the said patent in suit is invalid by reason of each, every and all the defenses, allegations and averments hereinbefore pleaded in this Answer, alleges upon information and belief that even if the said patent in suit be valid, (which this defendant expressly denies), that a large proportion of the horns for talking machines heretofore used and sold by this defendant, and the using and selling of which by the defendant are alleged to be in infringement of the patent in suit, were manufactured under a license direct, implied or otherwise, under said patent in suit and that defendant purchased said horns from a licensee under said patent in suit and that when said horns came into the hands of defendant they were released from the alleged monopoly, if any, of the patent in suit, and defendant in support of this defense further shows, among other things, said devices and apparatus hereinbefore specified were thereafter and have since continued to be used by the said Standard Metal Manufacturing Company in the manufacture of horns for talking machines and that said Standard Metal Manufacturing Company sold a number of said horns, manufactured as aforesaid, to this defendant and that the said horns so sold by said Standard Metal Manufacturing Company to this defendant are the horns, in part, at least, the use and sale of which by this defendant this plaintiff complains of in the Bill of Complaint herein and seeks to enjoin the further use and sale by this defendant and for the sales of which this plaintiff, among other things,

prays an accounting; defendant further avers that in and by said agreement entered into by and between said plaintiff and said Standard Metal Manufacturing Company, it was provided, among other things, that the said Standard Metal Manufacturing Company should stamp or label each horn manufactured by it as aforesaid, with the patent numbers and dates [76] of the patents owned by said plaintiff and defendant alleges, upon information and belief, that the said Standard Metal Manufacturing Company thereafter did stamp or label said horns as "Patented" under the said patents then belonging to the said plaintiff, among said patents being the patent in suit and that said horns purchased as aforesaid by this defendant from said Standard Metal Manufacturing Company were delivered to this defendant by said Standard Metal Manufacturing Company with the word "Patented" stamped or affixed thereon, as hereinbefore alleged; and defendant further avers, upon information and belief, that the manufacture and sale by the said Standard Metal Manufacturing Company, to this defendant of said horns under the conditions and circumstances aforesaid was at all that in or about the month of May, 1908, the said plaintiff entered into an agreement, for valuable considerations, with the Standard Metal Manufacturing Company, a corporation organized and existing under and by virtue of the laws of the State of New Jersey and having its principal place of business in the City of Newark, State of New Jersey, whereby, among other things, the said plaintiff licensed the said Standard Metal Manufacturing

Company to manufacture, use and sell horns embodying the alleged invention of the said patent in suit, and that upon the entering into of said agreement, as aforesaid, the plaintiff discontinued the manufacture of horns or any other devices and delivered to the said Standard Metal Manufacturing Company, for a valuable consideration, certain property belonging to the said plaintiff, and theretofore used by the said plaintiff in manufacturing horns for talking machines including horns claimed by plaintiff to embody the alleged invention of the patent in suit, said property consisting, among other things, of lathes, shafts, wiring and turning machines, groovers, [77] folders, blanking dies, forming dies, hinging machines, forming machines, dies, power presses, tool presses, drill presses, planers, shapers, vises, polishing wheels and numerous other devices theretofore used by said plaintiff in the manufacture of said horns, with the condition, understanding and agreement between the said plaintiff and the said Standard Metal Manufacturing Company, that the said Standard Metal Manufacturing Company would use said property hereinbefore specified in the manufacture, use and sale, among other things, of horns embodying the alleged invention of the patent in suit, and that the said Standard Metal Manufacturing Company should sell said horns in the open market and defendant further avers that the times in the knowledge and with the acquiescence of this plaintiff and that this plaintiff is thereby equitably and legally estopped from further prosecution of this suit.

23. And this defendant further answering the Bill of Complaint herein and herewith reaffirming, realleging and reaverring that the said patent in suit is invalid by reason of each, every and all the defenses, allegations and averments hereinbefore pleaded in this Answer, avers that even if the said patent in suit be valid (which defendant expressly denies), that it also purchased horns for talking machines alleged by the plaintiff to be in infringement of the patents in suit from The Tea Tray Co., now known as the National Metal Stamping & Manufacturing Company, a corporation organized and existing under and by virtue of the laws of the State of New Jersey, and alleges upon information and belief, that the said horns purchased as aforesaid from the said The Tea Tray Co., were manufactured by the said The Tea Tray Co., under, among others, U. S. Letters Patent No. 797,725, dated August 22, 1905 for Amplifying Horn to Charles J. Eichhorn, assignor to the said The Tea Tray Co., and [78] the following Design Letters Patent of the United States, No. 38,273, dated October 9, 1906, for Horn to Clement B. Beecroft, assignor to the said The Tea Tray Co., No. 38, 274, dated October 9, 1906, to Clement B. Beecroft for Horn, and assignor to the said The Tea Tray Co., and No. 38,202, dated August 28, 1906, for Amplifying Horn to Charles J. Eichhorn, assignor to the said The Tea Tray Co., and that the said horns purchased as aforesaid from the said The Tea Tray Co., were stamped or labeled "Patented" under said four letters patent, or some of them, and were sold by the said The Tea Tray Co.,

to the said defendant stamped or labeled "Patented" as aforesaid, and that the said defendant sold said horns stamped or labeled as aforesaid; and defendant further alleges, upon information and belief, that when the Standard Metal Manufacturing Company began to manufacture and to sell horns to this defendant, the use and sale of which by this defendant is complained of in the Bill of Complaint herein, the said The Tea Tray Co., at the request of this defendant, gave a license to the said Standard Metal Manufacturing Co., licensee of this plaintiff, as aforesaid, under said patent in suit, to manufacture and sell horns to this defendant embodying the inventions of said patents, Nos. 797,725, 38,273, 38,274, 38,202, and this defendant further alleges that the said Standard Metal Manufacturing Company, pursuant, among other things, to said license received from said The Tea Tray Co., began to manufacture and sell to this defendant horns complained of in the Bill of Complaint herein; and this defendant avers, upon information and belief, that the horns, the use and sale of which by this defendant is complained of in the Bill of Complaint herein, embodied and do embody the improvements of said letters patent, Nos. 797,725, 38,273, 38,274 and 38,202, owned by the said The Tea Tray Co., as aforesaid, and did not and do not embody, in any manner whatsoever, the alleged invention of the patent in [79] suit; and this defendant avers, upon information and belief, that it never purchased any of the horns complained of in the Bill of Complaint herein from any other source than the said Standard Metal Manufacturing Co.,

or the said Tea Tray Co., and this defendant further avers, upon information and belief, that this plaintiff has known at all times since the said the Tea Tray Co. began to manufacture and sell the horns complained of to this defendant, that the said The Tea Tray Co. was manufacturing and selling the said horns to this defendant and that the said The Tea Tray Co. was actively engaged in the manufacture, use, sale and public distribution of said horns and that the said plaintiff has also had knowledge that the said The Tea Tray Co. and the said Standard Metal Manufacturing Company have been actively engaged in the manufacture, use, sale and distribution of said horns not only to this defendant, but also to numerous other concerns engaged in the manufacture and sale of talking machines including the Columbia Phonograph Co. and the American Graphophone Co., each being a corporation organized and existing under and by virtue of the laws of the State of West Virginia and having their principal places of business in the City of New York, New York, the National Phonograph Co. and its successor, being a corporation organized and existing under the laws of the State of New Jersey and having its principal places of business at Orange, New Jersey; and this defendant alleges, upon information and belief, that in or about the year 1906, the said United States Horn Co., being then the alleged owner of the patent in suit, notified the said The Tea Tray Co. and the said The Standard Metal Manufacturing Co. of the existence of the patent in suit and that it (said United States Horn Co.) contended that

said The Tea Tray Co. and said Standard Metal Manufacturing Co. and each of them, were infringing upon said patent in suit and threatened suits to enjoin said alleged infringement unless [80] they were promptly discontinued, but that said The Tea Tray Co. and said Standard Metal Manufacturing Co. and each of them, refused to discontinue the manufacture, use and sale of the horns complained of and have openly and without interruption from the time of said notification to the present time continued the manufacture, sale and use of said horns with the knowledge, and without further complaint, of this plaintiff and its predecessors, said United States Horn Co., and that plaintiff's conduct in permitting such widely known and notorious manufacture, use and sale of horns during the several years last past, now alleged to be an infringement of the patent in suit is unconscionable and inequitable, and that plaintiff by reason of its conduct and laches as aforesaid, is estopped from now prosecuting this suit for an injunction and for an accounting, and that this defendant has had at all times, and now has an unqualified and absolute right to manufacture, use and sell said horns.

24. And this defendant avers that it has never manufactured horns like those complained of in the Bill of Complaint herein, but has purchased the same exclusively, as aforesaid, from the said Standard Metal Manufacturing Company and the said The Tea Tray Co. and its successor; and defendant further alleges, upon information and belief, that the horns, the use and sale of which by this defendant

this suit is brought to enjoin, are, and always have been, in all substantial respects, like the horns which this defendant has been selling for several years last past and since during 1905, and that plaintiff has been well aware of this fact and that said plaintiff and its predecessor have been well able during this whole period to bring suit against this defendant and said The Tea Tray Co. and its successor and said Standard Metal Manufacturing Co., for an injunction and accounting under the patent in suit, and [81] there was no good reason why plaintiff could not have commenced such suits long ago had it so chosen, but as plaintiff did not bring suits against this defendant, or against said The Tea Tray Co., and its successor, or against said Standard Metal Manufacturing Co. under said patent in suit following the said notices of infringement sent this defendant and said The Tea Tray Co. and said Standard Metal Manufacturing Co. by plaintiff's predecessor, United States Horn Co., in 1906, as aforesaid, defendant has long since supposed that the plaintiff has acquiesced in the right of said The Tea Tray Co. and its successors and of said Standard Metal Manufacturing Co. to make, use, and sell said horns, and in defendant's right to use and sell horns; that defendant has always acted in good faith in the belief that said horns so sold by it were not an infringement of the patent in suit; and that the conduct of the plaintiff has misled defendant into believing that the plaintiff was of the same belief or else had acquiesced in defendant's use and sale of these said horns for some other reason.

Without this, that there is any other matter, cause or thing in the said Plaintiff's Bill of Complaint, material or necessary for this defendant to make answer unto and not herein and hereby well and sufficiently answered, confessed and avoided, traversed or denied, true to the knowledge and belief of this defendant; all of which matters and things this defendant is ready and willing to aver, maintain and prove as this Honorable Court may direct, and humbly prays to be hence dismissed with reasonable costs and charges in this behalf most wrongfully sustained.

VICTOR TALKING MACHINE COMPANY,

By RALPH L. FREEMAN, (L. S.)

Assistant Secretary.

HORACE PETTIT,

Solicitor and of Counsel for Defendant. [82]

State of New Jersey,
County of Camden,—ss.

RALPH L. FREEMAN, being duly sworn, deposes and says: That he is Assistant Secretary of Victor Talking Machine Company, the defendant named in the foregoing Answer; that he has read said Answer, that the same is true of his own knowledge, save in so far as the allegations therein contained are stated to be based upon information and belief, and as to such allegations he believes it to be true.

RALPH L. FREEMAN.

Subscribed and sworn to before me, this 13th day of September, 1913.

CHARLES F. WILLARD,

(L. S.)

Notary Public.

My commission expires July 29th, 1918.

United States of America,

District of New Jersey,—ss.

I, George T. Cranmer, Clerk of the District Court of the United States of America, for the District of New Jersey, in the Third Circuit, do hereby certify the foregoing to be a true copy of the original Answer on file, and now remaining among the records of the said court, in my office.

IN TESTIMONY WHEREOF, I have hereunto subscribed my name and affixed the seal of the said court, at Trenton, in said District, this twenty-fourth day of July, nineteen hundred and fourteen.

[Seal]

GEORGE T. CRANMER,

Clerk District Court, U. S.

By C. S. Chevrier,

Deputy. [83]

[Endorsed]: United States District Court, District of New Jersey. Searchlight Horn Company, Complainant, vs. Victor Talking Machine Company, Defendant. Answer. Suit on Nielsen Patent No. 771,441. Filed September 15, 1913. [84]

*In the District Court of the United States, for the
District of New Jersey.*

IN EQUITY—No. 394.

SUIT ON NIELSEN PATENT No. 771,441.
SEARCHLIGHT HORN COMPANY,

Plaintiff,

vs.

VICTOR TALKING MACHINE COMPANY,
Defendant.

Certificate of Pendency of Suit.

I hereby certify that the Bill of Complaint in the above-entitled suit was filed in my office July 29, 1913; that the bill alleges infringement by the defendant of Nielsen United States Letters Patent No. 771,441, dated October 4, 1904; that as far as the records of this court show, the above-entitled suit is still pending and undetermined.

[Seal] GEORGE T. CRANMER,
Clerk of U. S. District Court for the District of New
Jersey.

By C. S. Chevrier,
Deputy.

July 23, 1914. [85]

Service of the within notice of motion, petition to enjoin prosecution of suits for infringement, affidavits of Andrew G. McCarthy, Chas. K. Haddon, certified copy of bill of complaint and answer and certificate as to pendency of suit re equity suit #394,

by a copy thereof admitted this 31st day of July,
A. D. 1914.

J. H. MILLER,
For Plaintiff.

[Endorsed]: No. 15,623. Filed Jul. 31, 1914.
W. B. Maling, Clerk. By J. A. Schaertzer, Deputy
Clerk. [86]

*In the District Court of the United States for
the Northern District of California, Second
Division.*

IN EQUITY—No. 15,623.

SEARCHLIGHT HORN COMPANY,
Plaintiff,

vs.

SHERMAN, CLAY & COMPANY,
Defendant.

**Answer of Plaintiff to Defendant's Petition to
Enjoin Prosecution of Suits for Infringement.**

Now comes the plaintiff in the above-entitled suit
and for answer to the defendant's aforesaid petition,
denies, admits and alleges as follows:

1. Referring to paragraph I of said petition
wherein it is alleged that defendant is a dealer in
musical instruments, and as a dealer purchased
from the Victor Talking Machine Company the in-
fringing horns complained of, for use in connection
with talking machines sold by musical dealers gen-
erally, this plaintiff avers that said paragraph I
is ambiguous and deceptive and does not state the
real facts of the case, but that the real facts are that

the defendant is the Pacific Coast distributing agent of the Victor Talking Machine Company for its talking machines and phonographic horns, engaged in selling the same to the various dealers throughout the Pacific Coast, which said dealers in turn sell the same for use by the ultimate consumer or user. While it is true that the defendant has heretofore sold some of those infringing horns at retail, for use by its consumers, and in that sense may be called a dealer, yet the fact is that the defendant is the general distributor of the Victor Talking Machine Company on the Pacific Coast engaged as aforesaid, and that its retail [87] business aforesaid is insignificant in comparison with its said wholesale business.

2. Answering paragraph II of said petition plaintiff admits that the present suit was begun about November 25, 1912, but to be exact on November 23, 1912, and that a preliminary injunction was granted on April 28, 1913; that an appeal therefrom was taken to the United States Circuit Court of Appeals for the Ninth Circuit, and on May 4th, 1914, said Court of Appeals rendered a decision affirming the decree of this court in granting said preliminary injunction.

3. Answering paragraph III of said petition, plaintiff admits that on July 29, 1913, plaintiff commenced a suit in equity in the District Court of the United States for the District of New Jersey against the Victor Talking Machine Company for infringement of the patent involved herein, said suit being Equity Suit No. 394, charging infringement of

claims 2 and 3 of said patent by the sale of phonographic horns of the same kind and identical in construction with those supplied by the Victor Talking Machine Company to the defendant herein, and complained of as being infringement of the patent in suit.

4. Answering paragraph IV of said petition, plaintiff admits that in and by its bill of complaint in said Equity Suit No. 394, in New Jersey, prayer was made that the Victor Talking Machine Co. be decreed to account for and pay over to the plaintiff all the gains and profits realized by said Victor Talking Machine Company by reason of its alleged infringement.

5. Answering paragraph V of said petition, plaintiff admits that the Victor Talking Machine Co. filed its answer in said Equity Suit No. 394, on September 15th, 1913.

6. Answering paragraph VI of said petition, plaintiff admits that a stipulation has been entered into to the effect that in said Equity Suit No. 394, the depositions taken in the [88] case at bar may be used, and it is to that extent and that extent only that the Victor Talking Machine Co. has taken its testimony in said Equity Suit No. 394.

7. Answering paragraph VII of said petition, wherein it is alleged that the defendant is one of the many hundreds of dealers of the Victor Talking Machine Co. located and doing business in the territory of the United States, plaintiff avers that it has no knowledge or information as to the exact number of such dealers, but in that behalf avers that in

the published advertisements of the Victor Talking Machine Company, in public newspapers and periodicals, the names and addresses are given of those dealers of the Victor Talking Machine Company in the same category as the defendant, and in such advertisements they appear to be not over 90 in number.

8. Answering paragraph VIII of said petition, wherein it is stated that defendant is not engaged at this time and has not been for a long time past engaged in the selling of said alleged infringing phonographic horns, plaintiff avers that it has no knowledge or information as to whether or not the defendant has since the preliminary injunction actually sold any of such horns, but nevertheless the fact is that the defendant is now advertising the same for sale, and in the last descriptive catalogue issued by the Victor Talking Machine Company and distributed by the defendant on the Pacific Coast, cuts and illustrations of said infringing horns are shown and prices of the same are quoted and the same are advertised for sale at said quoted prices, and not later than July, 1914, one of such catalogues was delivered by the defendant's agents to plaintiff's attorney, with the statement that such machines were on sale, but that the sales thereof were only occasional.

9. Answering paragraph IX of said petition, relating [89] to the action of this plaintiff against Wiley B. Allen & Company, plaintiff avers that the said action which is an action at law was commenced by plaintiff in the District Court of the United States

for the Southern District of California, on or about May 9, 1911, at the same time at which plaintiff began an action at law against the defendant herein in the Northern District of California for infringement of plaintiff's patent; that the object of bringing said action against Wiley B. Allen & Company was not for the purpose of harassing or annoying the Victor Talking Machine Co., but was merely for the purpose of securing the speediest possible trial of the issues involved in case the action at law in the Northern District could not be brought to a speedy trial. In other words, plaintiff filed the two actions simultaneously, one in the Northern District and the other in the Southern District, with the intention of trying only that one which could be first reached for trial, to the end that a speedy determination of the validity of the patent might be had, and the Victor Talking Machine Company was so notified by plaintiff's attorney; that the action in the Northern District came up for trial first and the same was tried and disposed of resulting in a verdict for the plaintiff, and a judgment entered thereupon which was afterwards affirmed by the United States Circuit Court of Appeals for the Ninth Circuit on May 4, 1914; that the suit against Wiley B. Allen & Company was never pressed for trial and probably never will be pressed for trial and will ultimately be dismissed as the only object of filing it was to secure a speedy trial, in case the action in the Northern District could not be speedily tried.

10. Answering paragraph X of said petition, plaintiff denies that it has threatened or still

threatens or continues to threaten to bring many other similar suits against dealers [90] of the Victor Talking Machine Company, or that unless restrained by this court will bring such suits, or will prosecute the same or continue to prosecute any suits heretofore brought against said dealers except the present suit against the defendant herein.

In that behalf plaintiff avers that all it has done in that connection is to send the usual warning letter to three dealers who are now still engaged in exhibiting for sale and selling and offering for sale these infringing horns, in which letters said dealers were notified of the decision of the Court of Appeals affirming the decision of this court sustaining the validity of the patent and calling on said dealers for an accounting of profits and damages and a cessation of infringement under the penalties of the law. In other words, plaintiff found these three dealers still engaged in selling and offering for sale infringing horns, which they stated had been purchased by them recently from the defendant herein, notwithstanding the fact that the defendant was under an injunction not to sell such horns, and, therefore, plaintiff considered it its right and duty to notify these three dealers that the continued sale of these horns was an infringement, and that they must discontinue the same; that one of said dealers has replied to said notice by saying that he had only sold in the last two or three years one or two of said horns, and that he would not sell any more, and thereupon plaintiff notified this dealer that his answer to the letter was satisfactory and no suit would be brought against

him. In the matter of the other two dealers, one of them has replied to the notice and asked for a consultation for the purpose of adjusting the matter, and plaintiff has replied thereto in a courteous manner saying that such conference would be granted and that such arrangement would undoubtedly be made as would prevent the necessity of a suit [91] against said dealer. And as to the third dealer, plaintiff avers that no answer has been received from him and that plaintiff has no present intention of bringing suit against him, and that the object of said notice was merely as a matter of protection to notify said dealer that his acts were an infringement, thinking that he was ignorant of the state of the case, and it was in order to protect the rights of the plaintiff in case it should ever be necessary to proceed against that dealer, but after having so notified said dealer it is not the intention of plaintiff to bring suit against him under the present condition of affairs.

11. Answering paragraph XI of said petition wherein it is alleged that the Victor Talking Machine Company is financially able to respond to an accounting to any judgment which may be rendered against it in said suit, No. 394, plaintiff avers that while that is true at the present time, it may not be true at the termination of the litigation against the Victor Talking Machine Company, and there is no certainty unless a bond be given that the plaintiff will be able to reap the fruits of any victory which it may ultimately win against the Victor Talking Machine Company.

And answering that portion of paragraph XI

which asserts that all the horns complained of in the present case and equally so in the pending case against the Wiley B. Allen & Company, are horns sold by the Victor Talking Machine Company, and that they are all subject to said accounting on any judgment which may be obtained in said Equity Suit No. 394, and must be accounted for by the Victor Talking Machine Co., in suit No. 394, plaintiff avers that the same is not true in its entirety for the reason that the suit against the Victor Talking Machine Company was not begun until July 29, 1913, whereas the present suit against Sherman, Clay & Company was begun on November 23, 1912; that in [92] the suit at bar plaintiff can recover compensation for all horns sold by defendant during six years prior to November 23, 1912, that is to say, from November 23, 1906, to the date of the accounting, whereas in the suit against Victor Talking Machine Company, No. 394, plaintiff can recover compensation only for such horns as were sold within six years prior to July 29, 1913, that is to say, from July 29, 1907, to the date of the accounting; that such horns as were sold by Sherman, Clay & Company between November 23, 1906, and July 29, 1907, can not be recovered for in the suit against Victor Talking Machine Co., No. 394, for the reason that recovery thereof is barred by the statute of limitations. Consequently, it is not true that in case of a favorable judgment in the suit against Victor Talking Machine Co., No. 394, plaintiff can recover all of the compensation he is entitled to recover in the suit against Sherman, Clay & Company.

12. Answering paragraph XII of said petition,

plaintiff admits that the defendant herein is not a manufacturer of the infringing horns involved, but procures the same from the Victor Machine Company, and in that behalf plaintiff avers that neither is the Victor Talking Machine Company a manufacturer of said horns, but, on the contrary, procures the same from various and sundry manufacturers in the Eastern States, that is to say, various and sundry manufacturers in the Eastern States manufacture said horns and sell them to the Victor Talking Machine Company, and the Victor Talking Machine Company in turn sells the same to Sherman, Clay & Company, the defendant herein, and the defendant herein in turn sells them to dealers throughout the Pacific Coast, and these dealers then sell them to the users at retail.

13. Answering paragraph XIII and XIV of said petition, plaintiff admits that it is not at this time engaged in the manufacture and sale of horns covered by the patent in suit, and [93] has not been so engaged since the month of May, 1908, and that when it was engaged in the business prior to May, 1908, it manufactured and sold its patented horns to dealers throughout the United States and was not a user of the same, but derived its profit, or attempted to derive its profit from its horns by the manufacture and unconditional sale thereof direct to dealers throughout the United States, and in that behalf plaintiff avers the facts are that prior to May, 1908, it was engaged in making and selling its patented horns, but that prior thereto the Victor Talking Machine Company and other phonographic

companies entered largely and extensively in the infringement of the patent in suit by purchasing from other manufacturers enormous quantities of infringing horns and selling the same throughout the United States, and refused to deal with the plaintiff; that the infringing horns so sold by the Victor Talking Machine Company and the other phonograph companies up to date is enormous in extent aggregating probably several millions inasmuch as nearly all of its pronographs prior to the introduction of the cabinet machines were provided with these infringing horns; that prior to May, 1908, plaintiff has notified the Victor Talking Machine Company and the other phonograph companies of the said infringement, and requested them to desist and cease therefrom, but that they declined to do so, and thereupon plaintiff endeavored to sell its patent to the Victor Talking Machine Company and the other phonograph companies, but they declined to purchase the same, and *containel* in their deliberate, willful and premeditated infringement; that by reason of said infringement plaintiff's business was wholly and entirely ruined and destroyed and practically wiped out of existence with a loss to loss to the plaintiff of about forty thousand dollars which it had invested in the business, and thereupon plaintiff was compelled by reason of the infringements aforesaid to wholly discontinue the business and turn over its plant to the other [94] manufacturing concern; that the plaintiff has not since been able to resume its business and is financially embarrassed to such an extent that it is impossible to resume it, for which

reason it has not made or sold any horns since May, 1908, having been prevented from doing so by the infringing acts of the Victor Talking Machine Company and the other phonograph companies; that under these facts it cannot be asserted that the plaintiff is enjoying any profits or attempting to enjoy any profits from its patent by the manufacture and sale of its patented horns, and the compensation which the plaintiff is entitled to recover against the Victor Machine Company and other infringing companies is the damage which the plaintiff has suffered and such profits as it may be able to prove that these infringers have made by reason of their infringement.

And answering the latter portion of paragraph XIV of said petition wherein it is set up that upon the satisfaction by the said Victor Talking Machine Company of any judgment which may be rendered against it by an accounting obtained in connection with said suit No. 394, in the District Court of the United States for the District of New Jersey, that the infringing horns sold by the said Victor Talking Machine Company to its dealers will be released from the patent monopoly, and that the defendant herein will not be liable to the plaintiff, this plaintiff avers that the same is not wholly true for the reason that many of the infringing horns sold by the Victor Company to the defendant and by the defendant sold to others, cannot be recovered for in the suit against the Victor Talking Machine Co., No. 394, because of the statute of limitations as hereinabove pointed out.

14. And answering paragraph XV of said peti-

tion, plaintiff denies that unless it is restrained from continuing the prosecution of the present suit and from bringing other suits [95] of a like nature against dealers in this Circuit, the Victor Talking Machine Company will suffer irreparable or any injury or damage by the loss to the Victor Company of its dealers or for any other reason; denies that unless such injunction is granted the Victor Talking Machine Company will lose any of its dealers, or that any of its dealers, on account of the harassment, annoyance and expense occasioned by the acts of the plaintiff, will fall away from the Victor Talking Machine Company or will cease to patronize said company in the purchase of any or all machinery or accessories of any kind or nature incident to the talking machine business, or foreign to the horns in question; that such allegation in the petition in paragraph XV is wholly a pretense and a sham and that said Victor Talking Machine Company has no fears whatever that it will lose any of its dealers on account of any suits to be brought or that may be brought by the Searchlight Horn Company, the fact being that said Victor Talking Machine Company guarantees to protect its dealers against all suits for infringement of patents brought in respect of the Victor Talking Machine Company's machinery and accessories.

15. And answering paragraph XVI of said petition, plaintiff denies that its purpose in the acts and course which it is pursuing or threatens to pursue is to harass or annoy dealers of the Victor Talking Machine Company or to harass or annoy the Victor

Talking Machine Company, or to put the said company or the defendant herein, or any dealer or dealers in the Victor Talking Machines to needless or any expense by being called upon to defend a multiplicity of suits or any suit or suits for alleged infringement of the patent in suit.

16. And for a further answer to said petition and as a reason for denying the same, and as showing that it *would inequitable* to grant the same, plaintiff avers that on or about [96] May 9th, 1911, it instituted an action at law in this court against Sherman, Clay & Company to recover damages for infringement of the patent in suit; that the same was brought as a test case for the purpose of testing the validity of the patent; that the said action was defended by the Victor Talking Machine Company, and was fully tried on the merits; that a verdict for the plaintiff therein was rendered on or about October 4th, 1912; that thereafter the Victor Talking Machine Company, acting through the defendant, made a motion for a new trial which after full argument was denied; that thereafter said Victor Talking Machine Company, acting through the defendant sued out a writ of error from the United States Circuit Court of Appeals for the Ninth Circuit to review the said judgment; that upon a hearing and a full argument in the said Circuit Court of Appeals, the judgment of this court in said action at law was affirmed on May 4, 1914; that the number of said action at law in this court is No. 15,326; that after the rendition of this judgment in the action at law, the defendant herein deliberately and willfully and maliciously continued

to infringe upon the patent in suit, notwithstanding the fact of the said judgment in the action at law wherein it was adjudged that the patent was valid; that thereupon, on November 23, 1912, plaintiff for the protection of its rights was compelled to file and did file in this court a bill of complaint in the present suit, and asking for the granting of a preliminary injunction, which motion was granted and the said writ of preliminary injunction was issued on April 29, 1913; that thereafter at a regular term, 1913, of this court, this, the present suit in equity, came on regularly to be set for trial, but the defendant's attorney objected to the trial of the same upon the ground that an appeal from the order [97] granting said preliminary injunction had been taken and that a writ of error had been issued to review the judgment in the action at law, and that it would be in the interests of both parties to continue the trial of this suit until after the decision of the Court of Appeals in the aforesaid matters, intimating, if not stating in so many words, that if the judgment and decree aforesaid were affirmed then there would be no further contest in the present case; that this court granted the motion of defendant's attorney and continued the case, or rather struck it from the calendar under the new equity rules in order to await the decision of the Court of Appeals; that the decision of the Court of Appeals was rendered on May 4, 1914, whereby the judgment in the action at law was affirmed and the motion granting a preliminary injunction in the suit in equity was likewise affirmed; that the mandates from the Court of Appeals were

filed herein on June 4, 1914; that instead of abiding by the decision of said Court of Appeals, as had been intimated by defendant's attorney would be done, the said defendant on or about May 15th, 1914, filed an amendment to its answer and served notice on defendant that it would proceed to take depositions of witnesses at Pittsburg, Pa., Hartford, Conn., New York City, Philadelphia, Pa., Cleveland, Ohio, and Chicago, Illinois, naming no less than 100 witnesses to be examined; that a copy of the said notice is hereunto annexed and made a part hereof; that in pursuance of said notice defendant's attorney, N. A. Acker, of San Francisco, proceeded to the eastern states and under said notice took the testimony of a great many witnesses named therein and some who were not named therein, and thereby accumulated a large mass of testimony for the purpose of proving the invalidity of the patent in suit on account of alleged [98] prior uses by other persons, notwithstanding the fact that that issue had become *res adjudicata* between the parties hereto by reason of the action at law aforesaid and the final judgment therein; that plaintiff was compelled to employ attorneys in the east to attend the taking of these depositions and has been to a large expense for costs and counsel fees and has been compelled to borrow money to liquidate the same, and is still indebted for a large amount in respect of said depositions; that the said depositions were taken on the theory that when the case was called for trial at the present term of Court the same would be set for trial on a day certain and be tried, and in pursuance of that understanding the

depositions were hurried up in the east in order that they might be here in time for the trial of the case; that it was stipulated and agreed in writing between the parties hereto that this suit should be restored to the present trial calendar of the Court, which said stipulation was signed on or about the 7th day of August, 1914, and a copy of the same is hereunto annexed and by such reference made a part hereof; that in view of these facts and of the above conditions, plaintiff has prepared for the trial of this case, at the present term of the Court, to wit, the July, 1914, term, and it was not until July 31, 1914, on which day it received the petition and the notice of motion herein from defendant that plaintiff had any intimation whatever that a postponement of the trial would be asked or that any effort would be made to suspend the further prosecution of the case. And in this behalf plaintiff further avers that if the further prosecution of this case is suspended until plaintiff tries its case against the Victor Talking Machine Company in New Jersey, plaintiff's attorney, John H. Miller, who resides at San Francisco, will be compelled to go to New Jersey to attend [99] the trial and to be present there for a period of time which he cannot calculate or forecast in connection with said trial, and thereby the plaintiff will be put to a large and onerous cost and expense, which it is unable to defray at the present time, thereby compelling plaintiff's said attorney to advance the money for these costs and expenses with the probability of never getting it back except at the end of a long and tedious litigation in the eastern states; that even if a favor-

able judgment were rendered in favor of the plaintiff in the suit against the Victor Talking Machine Company in New Jersey, there is every reason to believe, judging by the past conduct of the said Victor Talking Machine Company, that an appeal would be taken to the Court of Appeals, and that the matter would be further tied up indefinitely, to await the decision of the Court of Appeals and in all probability it will be several years before any ultimate result is reached; that by reason of these facts it would be inequitable, harsh and oppressive on the plaintiff to suspend the further prosecution of this case and compel it to prosecute the suit against the Victor Talking Machine Company; and this plaintiff protests in the most vigorous manner it can against such suspension of this case and insists that the same would operate as a hardship on the plaintiff and would be unjust and inequitable.

And in this behalf plaintiff further avers that this present suit is being defended and has always been defended by the Victor Talking Machine Company, but in and under the name of the defendant herein; that said Victor Talking Machine Company has selected and appointed the attorneys for defendant herein, and has furnished all the moneys and means for the defense thereof and has conducted the defense thereof, as fully and completely as though the Victor Talking Machine Company were the defendant named [100] therein. Furthermore, in its bill filed against the Victor Talking Machine Company in New Jersey, plaintiff alleged that the action at law in this court against the Sherman, Clay & Com-

pany had been and was defended by the Victor Machine Company, and the answer of the Victor Talking Machine Company admits that fact, all of which will be seen by reference to the bill and answer annexed to defendant's petition herein as exhibits; that the reason why the Victor Talking Machine Company assumed the defense of and defended the action at law aforesaid and the present suit in equity was that said Victor Talking Machine Company had guaranteed to protect the defendant from said infringement and from any and all infringements that might be charged against it in respect to the sale of the Victor goods by defendant; that by reason of said guarantee it became the duty of the Victor Company to defend both the action at law and the present suit in equity, and that in pursuance of said duty it did defend both said the action at law and the present suit in equity; that by reason of the facts aforesaid, the judgment in the action at law has become *res adjudicata* between this plaintiff and the Victor Talking Machine Company in respect to the issues decided in said action at law and also that any judgment or decree which may be rendered in the present suit in equity against Sherman, Clay & Company will likewise become *res adjudicata* as between the plaintiff and the Victor Talking Machine Company; that as a matter of legal tactics, it is to the interests of the plaintiff that the present suit in equity be tried before the trial of the suit against the Victor Talking Machine Company in New Jersey for the reason that the decree herein can be pleaded as *res adjudicata* in the said suit against the Victor Talking Machine

Company in New Jersey, and inasmuch [101] as the Victor Talking Machine Company has always defended and is now defending the present suit in equity, no injustice would be done to the Victor Company, nor to the defendant by allowing this present case to be tried first, whereas it would be a great detriment and disadvantage to the plaintiff to suspend the present suit and compel it to try the suit against the Victor Talking Machine Co. in New Jersey before trying the present case.

Plaintiff further avers that the current trial calendar of this court was called on August 10th, 1914, at which time this case was set for trial on August 25th, 1914, without objection from the defendant's attorney; that it would be but very little additional expense to the plaintiff to try the case on August 25th, whereas it would be of very great and enormous expense to the plaintiff to have this case suspended and be compelled to try first the case against the Victor Talking Machine Company in New Jersey; that the plaintiff is impecunious and without any means or money for the trial of these cases other than what it has arranged to be furnished by other persons, and in order to secure the same a great sacrifice had to be made, and for additional expenses in the matter of costs and expenditures a larger burden is on the plaintiff, whereas the Victor Talking Machine Co. is a rich and powerful corporation having many millions of assets with a corps of attorneys hired by the year as well as with special attorneys hired for each occasion, and the matter of costs and expenses to them in a lawsuit of this kind is a mere bagatelle and

of no appreciable detriment. In other words, this is a case of a controversy by an impecunious and impoverished patent owner against a rich and powerful infringer, and the more expense the patent owner is put to and the longer the litigation is extended and kept in Court. plaintiff's case is weakened and the defendant's case strengthened so far as any definite [102] result is concerned, and a delay in justice under such circumstances is practically and in effect a denial of justice.

WHEREFORE, plaintiff protests against the suspension of the prosecution of this case and asks that the defendant's petition be denied, and that the trial of this case be allowed to proceed on August 25, 1914, that being the day on which the same was regularly set for trial.

SEARCHLIGHT HORN CO.

By MILLER & WHITE,

Attorneys for Plaintiff.

State of California,

City and County of San Francisco,—ss.

JOHN H. MILLER, being duly sworn deposes and says: That he is the attorney for plaintiff in the above-entitled case; that he makes this verification on behalf of plaintiff for the reason that it is a foreign corporation and has no officer in the State of California, and no other agent than affiant; that according to the best of his knowledge, information and belief the facts stated in the foregoing answer are true.

JOHN H. MILLER.

Subscribed and sworn to before me this 12th day of August, 1914.

[Seal]

W. W. HEALEY,
Notary Public in and for the City and County of San Francisco, State of California. [103]

District Court of the United States in and for the Northern District of California, Second Division.

IN EQUITY—No. 15,623.

SEARCHLIGHT HORN COMPANY,

Complainant,

vs.

SHERMAN, CLAY & COMPANY,

Defendant.

Exhibit Referred to in Answer.

To Searchlight Horn Company, and Messrs. Miller & White, Its Attorneys, Crocker Building, San Francisco, California.

Gentlemen: You are hereby notified that on Thursday, the twenty-eighth day of May, 1914, at the office of William T. Lindsey, Esq., Clerk of the United States District Court, at his office in the Federal Building, at Pittsburg, County of Alleghany, State of Pennsylvania, before the said William T. Lindsey, Esq., as Examiner of the said United States District Court, commencing at the hour of ten o'clock A. M. and continuing from day to day until completed, the defendant herein will proceed to take by deposition *de bene esse*, under and in accordance with the provisions of Sections 864 and 865 of the

Revised Statutes of the United States, the testimony of the following-named witnesses: Paul Kohler, Harry P. Keeley, Robert S. Siegfried, Adolph Hammer, Frank J. Kleber, Harry Kleber, Louis Kleber, George Dimling, Jr., John Sanderson, William Sanderson, Malyina Sanderson, George Stock, Harry Sanderson, Daniel J. Cable, Henry Braut, Edwin A. Grau, Paul Hunt, T. E. McCausland, T. J. Smith, B. P. [104] Peterson, Charles Gudekunst, Andy King, Ernest W. Friend, David S. Hartley, Willis L. King, George McNemery, Arthur Live, William Witt, E. W. Smith, Fred J. Kneipp, Cris Coulter, Albert Bert, James Tallon, Jak Pferr, John W. King, Isabella J. King, Charles Jamison, Mary Ellen Duffy, Minnie Ricks, Ellsworth Johnson, Peter Gallagher, all of the said City of Pittsburgh, Gustave C. Hammer, residing at Bellevue, Pennsylvania, Daniel Betzler, Ellen Betzler and Harry Betzler, residing at Oak Station, Pennsylvania, Mr. A. R. Meyer and Mrs. A. R. Meyer, residing at Lucesco Post Office, Pennsylvania, John Lippla, residing at Brookline, Pennsylvania, Mark Porrito, residing at Butler, Pennsylvania, Otto Reibling, residing at Lawrenceville, Pennsylvania, and John Baker, residing at Tarentum, Pennsylvania. Adjournments will be taken from day to day and at such time and place as may be necessary for the taking of the said depositions without further notice.

At the conclusion of the testimony of the foregoing witnesses taken at Pittsburg, Pennsylvania, an adjournment will be taken and immediately thereafter the defendant will proceed to the City of Hartford,

State of Connecticut, and to the office of Edwin W. Marvin, Esq., Clerk of the United States District Court, situated in the Federal Building, at Hartford, State of Connecticut, before said Edwin E. Marvin, Esq., at his offices in said Federal Building (and on a date and at an hour to be stated at the time of said adjournment) will proceed to take the testimony of Ellsworth A. Hawthorne, residing at Bridgeport, Connecticut. Adjournments will be taken from day to day and at such time and place as may be necessarily for the taking of the said depositions without notice.

At the conclusion of the testimony of the foregoing witness taken at Hartford, Connecticut, an adjournment will be taken and immediately thereafter the defendant will proceed [105] to the City of New York, State of New York, and to the office of John A. Shields, Esq., United States Commissioner, situated in the Federal Building, in said City of New York, State of New York, and before the said John A. Shields, Esq., at his office in said Federal Building (on a date and at an hour to be stated at said time of adjournment), will proceed to take the testimony of Park Walters, residing at the said City of New York, State of New York. Adjournments will be taken from day to day and at such time and place as may be necessary for the taking of the deposition without further notice.

At the conclusion of the testimony of the foregoing witness to be taken at New York City, State of New York, an adjournment will be taken and immediately thereafter the defendant will proceed to the

City of Philadelphia, State of Pennsylvania, and to the office of Horace Pettit, Esq., #705 Witherspoon Building, in the City of Philadelphia, State of Pennsylvania, and before Alexander Park, a Notary Public in and for the City of Philadelphia, will proceed to take the testimony of Horace Sheble, Theodore F. Bentel, Ben Stright, Frank J. Osmun, and Fred Browning, residing at Philadelphia, Pennsylvania, and of Louis G. Clarke, residing at Ardmore, Pennsylvania. Adjournments will be taken from day to day and at such time and place as may be necessary for the taking of the depositions of said witnesses without further notice.

At the conclusion of the testimony of the foregoing witnesses to be taken at Philadelphia, Pennsylvania, an adjournment will be taken and immediately thereafter the defendant will proceed to the City of Cleveland, State of Ohio, and to the office of Bertrand C. Miller, Esq., Clerk of the United States District Court, situated in the Federal Building in said [106] City of Cleveland, State of Ohio, and before said Bertrand C. Miller, Esq., at his said office in the said Federal Building, (on a day and at a time to be stated at the time of said adjournment) will proceed to take the testimony of Sam L. Stright, residing at Cleveland, Ohio. Adjournment will be taken from day to day and at such time and place as may be necessary for the taking of the said deposition without further notice.

At the conclusion of the testimony to be taken at Cleveland, Ohio, an adjournment will be taken and immediately thereafter the defendant will proceed

to the City of Chicago, State of Illinois, and to the office of Thomas C. McMillum, Esq., Clerk of the United States District Court, situated in the Federal Building, in said City of Chicago, State of Illinois, and before the said Thomas C. McMillum, Esq., at his office in said Federal Building (on a day and at an hour to be stated at the time of said adjournment), will proceed to take the testimony of Henry Fromme, residing at said City of Chicago, State of Illinois. Adjournment will be taken from day to day and at such time and place as may be necessary for the taking of the said deposition without further notice.

The reason for taking the said depositions at the times and places and before the mentioned officers and in the manner stated is, and the fact is, that all of said witnesses whose testimony is to be taken respectively at Pittsburgh, Pennsylvania; Hartford, Connecticut; New York City, New York; Philadelphia, Pennsylvania; Cleveland, Ohio; and Chicago, Illinois, and each of them live at a greater distance from the place of trial of this cause than one hundred miles, each of the said cities mentioned being situated more than one hundred miles from any place at which a District Court of the United States for the Northern District of California is appointed to be held by law, [107] and more than one hundred miles from the City and County of San Francisco, State of California.

You are invited to be present and cross-examine

the said mentioned witnesses.

Respectfully,

N. A. ACKER,

Attorney for Defendant.

San Francisco, Calif., May 15, 1914. [108]

*In the District Court of the United States for the
Northern District of California, Second Division.*

IN EQUITY—No. 15,623.

SEARCHLIGHT HORN COMPANY,

Plaintiff,

vs.

SHERMAN, CLAY & COMPANY,

Defendant.

(Affidavit of John H. Miller.)

State of California,

City and County of San Francisco,—ss.

JOHN H. MILLER, being duly sworn, deposes and says:

I am the attorney for the plaintiff in this case, and in all of its suits for infringement of its horn patent.

In the affidavit of Andrew G. McCarthy, filed on behalf of the defendant herein it is asserted that the defendant has not sold or offered for sale any of the infringing horns since the decision of the Court of Appeals affirming the order granting an injunction. On that subject I have no positive knowledge, but I do know that since that decision I have visited several retail dealers in musical instruments both in San Francisco and Los Angeles, and have there seen

on sale and offered for sale infringing horns attached to Victor Talking Machines, and these dealers in each case informed me that those horns were obtained from Sherman, Clay & Company, the distributing agent of the Victor Talking Machine Company on the Pacific Coast. These infringing horns are now openly being exposed for sale and offered for sale by the aforesaid retail dealers. How many similar dealers there are offering similar infringing horns obtained from the defendant throughout the Pacific Coast I do not know, as I have investigated only San Francisco and Los Angeles. I also know that there is now in circulation and in [109] use catalogues issued by the Victor Talking Machine Company and distributed by the defendant herein throughout the Pacific Coast, in which there are pictorial illustrations of these infringing horns and a price list thereof, said catalogues being printed not only in English for the purpose of reaching the English speaking people, but in various and sundry other languages to reach people speaking those languages. In the latter part of July, 1914, I called on the Los Angeles house of Sherman & Clay Co., and asked for their latest catalogue, and they furnished me with the same, which I now have in my possession, and in that catalogue there are seven illustrations of infringing horns offered for sale in connection with the Victor Talking Machines, with descriptions of the same and the prices thereof. Furthermore, said catalogue contains a price list of what is therein styled "Victor Flower Horn," in which there are six different sized flower horns with the price of each one stated, and

the person in charge of said store who gave me the catalogue informed me that they had these goods in stock and on sale and were selling the same. I also called at another store in Los Angeles, the Southern California Music Company, and received from them a similar catalogue with a similar statement. I also called on still another dealer in Los Angeles and received there a catalogue of the Victor Talking Machine Company printed in Spanish, another printed in Turkish and another in various and sundry Slavic languages, all containing illustrations of the infringing horns with prices quoted. Under these circumstances I cannot believe the statement of Mr. McCarthy that the defendant has not offered for sale any of these phonographic horns since the decision of the Court of Appeals.

I also note the statement of Mr. McCarthy in his affidavit that all of the horns involved in this suit are subject to any [110] accounting which may be had in the equity suit against the Victor Talking Machine Company in New Jersey and must be accounted for in that case, and that such accounting will dispose of the entire matter involved in the present case, and give the plaintiff all that it is justly entitled to for any infringement that may have been committed by the defendant. This statement is not fully accurate for the reason that some of the horns involved in the present case cannot be accounted for in the case against the Victor Talking Machine Company by reason of the statute of limitations as pointed out in the plaintiff's answer to the defendant's petition herein, the fact being that the suit against the Victor

Company in New Jersey was not commenced until nearly a year after the commencement of the present suit against Sherman, Clay & Company.

I also note the statement in Mr. McCarthy's affidavit that the plaintiff received no revenue from its patent by way of royalties or under any license agreement entered into prior to the commencement of the suits herein mentioned or the granting of licenses for the use of the same. That fact is true and is due entirely to the infringement by the Victor Talking Machine Company and the other phonographic companies whereby the plaintiff's business was broken up and destroyed in 1908.

Referring to the affidavit of Charles K. Haddon on behalf of defendant, I note the statement that so far as the defendant is concerned, the suit against the Victor Talking Machine Company in New Jersey is in a condition to be set for final hearing, at a comparatively early date, dependent entirely upon the action of the plaintiff. This statement is not true so far as the comparatively early date is concerned. The fact [111] is that the calendar of the District Court of New Jersey is so crowded and congested that it will be a very long time, how long is unknown, before that case can be brought to trial. It was called at a recent calendar of that court and the presiding judge stated that if it was to be tried in court there was no telling when it would be reached, that it was impossible to fix the date for the trial on account of the crowded condition of the calendar, and it went over indefinitely in order to await the determination of the large number of cases in that

court which were ahead of it and which would have to be tried before this case could be reached. It is a matter of uncertainty when the case can be reached for trial, but I am advised by my associate counsel in that case, who resides in New Jersey, and is more familiar with the matter than I am, that there is no possible way of telling when the case can be brought on for hearing due to the crowded condition of the calendar and that in his opinion it will be at least a year before we could get to trial. I have done everything I reasonably can do by stipulation with opposing counsel to speed that case, and in that behalf I have stipulated that the depositions which have been taken in the case at bar may be offered in evidence in the New Jersey case without the necessity of retaking that testimony, and that copies of the same might be offered in evidence in the New Jersey case with the same force and effect as if actually taken therein. I did this at the request of the attorneys for defendant in this case and in the New Jersey case, both to save expense and to speed the cause.

I note the further statement in the affidavit of Mr. Haddon that he is informed and believes that the plaintiff has threatened and still threatens to bring many other similar suits against many of the dealers of the Victor Talking Machine Company. This statement I deny. I have charge of the [112] plaintiff's litigation and I have no intention at the present time of pursuing that course. One of my reasons for not doing so is that the plaintiff is with-

out sufficient financial means to institute and carry on said litigation.

I also note in Mr. Haddon's affidavit the further statement that unless plaintiff is restrained it will bring innumerable suits in the Northern District of California against Victor dealers. This statement I likewise deny.

I also note the statement in Mr. Haddon's affidavit that all the horns involved in this case can and will be accounted for in the suit against the Victor Company of New Jersey. I have already pointed out that this is not correct for the reason that many of the horns involved in this case would be barred from an accounting in the New Jersey case by reason of the statute of limitations.

I also note the statement that the bringing of suits against dealers will entail irreparable injury and damage to the Victor Talking Machine Company, and cause it to lose its customers and dealers. All of this I deny and characterize the statement as a pretense and a sham, for one reason among others that the Victor Company guarantees all of its dealers against infringement suits and takes charge thereof and defends the same.

I also note the statement in Mr. Haddon's affidavit that he believes that the purpose of plaintiff is to harass and annoy the Victor Talking Machine Company's customers and to put them to needless expense and destroy and break down the business of the Victor Company. This I likewise deny most emphatically. I have no such intention or desire. In fact, it was for the purpose of avoiding any such

charge as this, among other reasons, that I instituted and prosecuted the present [113] suit as a test case, thinking and hoping that a favorable decision therein for the plaintiff would induce the Victor Talking Machine Company to settle the litigation and prevent any further expenses or trouble on either part. The action at law and the suit in equity against the Sherman, Clay & Company have always been treated by us as test cases, and inasmuch as they were both defended by the Victor Talking Machine Company without expense to the defendant herein, as I am informed and believe, I can see no hardship to the Victor Company or anyone else in allowing us to prosecute this suit first before prosecuting the New Jersey case.

To compel us to prosecute the New Jersey case first would entail great cost, expense and hardship on the plaintiff, because it would compel me to go to New Jersey to try the case and my client is impecunious and without financial means to prosecute this litigation other than what it can borrow and that at a great sacrifice, whereas the Victor Talking Machine Company is a very rich corporation and can afford to expend any amount of money in this litigation, if thereby it can weaken and deter the plaintiff from further proceeding with its litigation. It will be a far greater hardship on the plaintiff to compel it to try its New Jersey case first than it would be on the Victor Talking Machine Company to try the present case first in California.

I can try the present case in California at a comparatively small expense to my client, but cannot try

the case in New Jersey first without a very large expense.

Furthermore, if I am compelled to try the New Jersey case first, the litigation will be delayed and extended to a much longer period of time that if I try the California case first.

And still further, it is a matter of great tactical [114] advantage for me to try the California case first for the reason that it is being defended by the Victor Talking Machine Company and in case of a favorable judgment for my client, I can plead that judgment in the New Jersey case as *res adjudicata* and in that event the judgment in the New Jersey case in favor of the plaintiff would follow as a matter of course, and without much cost or expense. I think my client is entitled to this tactical advantage, and I insist that it is one of our rights to proceed with the California case first, not only because it is for the best interests of my client but because it will shorten the litigation.

JOHN H. MILLER.

Subscribed and sworn to before me this 12th day of August, 1914.

[Seal] W. W. HEALEY,
Notary Public in and for the City and County of San Francisco, State of California.

Service of the within answer and affidavit admitted this 12th day of Aug. A. D. 1914.

N. A. ACKER,
Atty. for Deft.

[Endorsed]: Filed Aug. 12, 1914. W. B. Maling,
Clerk. By J. A. Schaertzer, Deputy Clerk. [115]

*In the District Court of the United States for the
Northern District of California, Second Division.*

IN EQUITY—No. 15,623.

SEARCHLIGHT HORN COMPANY,

Plaintiff,

vs.

SHERMAN, CLAY & COMPANY,

Defendant.

Stipulation for Continuance.

It is hereby stipulated and agreed by and between the parties to the above-entitled suit that the trial of the said case which has heretofore been set for August 25, 1914, be postponed until the November, 1914, Term of said court, and that at said November 1914 Term the case shall be tried without further objection from defendant or any further motion for a continuance.

And in consideration of the making of the above stipulation on the part of the plaintiff's attorney, it is stipulated and agreed that the defendant in the case of Searchlight Horn Co. vs. Victor Talking Machine Company, No. 394, in the District Court of the United States for the District of New Jersey, shall not without the written consent of the plaintiff's attorney bring that case on for final hearing or take any step in that direction prior to the final hearing of the above-entitled case at the time pro-

vided for in the above stipulation.

MILLER & WHITE,
Attorneys and Counsel for Plaintiff in Both said
Cases.

HORACE PETTIT,
N. A. ACKER,
Attorneys and Counsel for Defendants in Both Said
Cases.

Dated August 19, 1914.

[Endorsed]: Filed August 24, 1914. Walter B.
Maling, Clerk. [116]

*In the District Court of the United States, Northern
District of California, Second Division.*

No. 15,623—IN EQUITY.

SEARCHLIGHT HORN COMPANY, a Corpora-
tion,

Plaintiff,

vs.

SHERMAN, CLAY & COMPANY, a Corporation,
Defendant.

Memorandum Opinion.

MILLER & WHITE, for Plaintiff.

NICHOLAS A. ACKER, for Defendant.

VAN FLEET, District Judge.

On the motion to stay or enjoin the further prosecution of the present action until the trial and determination of the suit by the same plaintiff against the Victor Talking Machine Company since brought in the District Court of New Jersey, I find on further

examination of the case that the impression gained by me at the argument that the application was ruled by the principles announced in *Stebler vs. Riverside etc. Association*, 211 Fed. 985, and *Allis vs. Stowell*, 16 Fed. 783, and other cases of like character relied on by the petitioner, was erroneous. Those cases all present instances where the plaintiff, having sued the infringing manufacturer, was enjoined from maintaining suits against individual users of the device purchased from such manufacturer, upon the principle that a recovery against the latter would [117] fully compensate the plaintiff for the damages suffered by reason of the fact that the accounting would necessarily include the profits gained from all sales to such users and thus operate as a license to the latter; and that consequently to permit a multiplicity of suits against the users before the determination of the main case would be oppressive and vexatious. But that it is not this case. The New Jersey suit is not against the manufacturer or primary infringer. The defendant in that case is itself a buyer from the manufacturer, who sells or ships the devices in suit to the defendant here and other dealers for re-sale to still other and smaller dealers, who in turn sell to the ultimate users. The defendant in this case is therefore a distributor or dealer in the alleged infringing articles standing on a precisely similar plane under the law as the defendant in the New Jersey suit, and is not a user; and the object of this suit is to enjoin such sale and distribution, with the recovery of damages for the infringing acts, precisely as is the object of the suit

against the New Jersey defendant. In other words, the defendant in this case and the defendant in the New Jersey case are guilty of precisely like acts of violation of plaintiff's rights, differing only in degree but not in kind. They are both tort-feasors and are equally liable to a suit by plaintiff at its pleasure or election. Under these circumstances the plaintiff was entirely within its rights in bringing this action and maintaining it; and the suit here having been first brought, and this Court having thereby first obtained jurisdiction, and the cause being now ready for trial, and moreover, as appears from the showing, defended by the same party who is defendant in the New Jersey suit, there is nothing presented in the cases relied on which [118] in equity or good conscience should dictate a postponement to await the disposition of the case against one standing in substantially the same relation to the subject-matter. The incidental fact that the present defendant purchased or procured the offending devices from the defendant in the New Jersey case does not, within the principles of those cases, alter in any legal sense the right of plaintiff to proceed against it; and it is in that aspect that we are dealing with the rights of the parties. Could plaintiff have a full recovery in the New Jersey case for all the damages suffered from the acts of the defendant here, there would perhaps be more analogy between this case and those relied on, but the facts show that by reason of the intervention of the statute of limitations the same extent of relief sought against the present defendant under the allegations of the bill could not be

had against the New Jersey defendant.

Under all the circumstances, and having in mind the history of the litigation between the parties here, I am of opinion that it would be inequitable to deny plaintiff the right to proceed. That this action is being prosecuted or other actions threatened in any oppressive or vexatious spirit, I regard as fully negatived by the showing made in opposition to the motion; and should such spirit manifest itself by any future act of the plaintiff it will always be within the power of the Court, upon proper application, to protect defendant, or those whom it represents, against its effect.

The application for a stay is denied.

In the matter of the motion pending in this case to strike out certain features of the answer, upon full consideration I am of the opinion that the matter can best be controlled at the trial in rulings upon the evidence when presented; and in that [119] view the motion will be denied, without prejudice to the right of the defendant to interpose any proper objection to evidence deemed to be within the features of the answer sought to be stricken.

[Endorsed]: Filed Aug. 19, 1914. Walter B. Mal-
ing, Clerk. [120]

*In the District Court of the United States, Northern
District of California, Second Division.*

No. 15,623—IN EQUITY.

SEARCHLIGHT HORN COMPANY, a Corpora-
tion,

Plaintiff,

vs.

SHERMAN, CLAY & COMPANY, a Corporation,
Defendant.

Petition for Order Allowing Appeal.

Sherman, Clay & Company, the above-named defendant, conceiving itself aggrieved by the order made and entered by said Court in the above-entitled cause on the 19th day of August, 1914, denying defendant's motion that complainant be enjoined and restrained from the further prosecution of the above-entitled suit and from bringing any other suit or suits within the jurisdiction of this Court against vendees of Photographic Horns, alleged to be an infringement of United States Letters Patent No. 771,441, and secured from the vendor thereof, the Victor Talking Machine Company, party defendant to Equity Suit No. 394, pending in the United States District Court for the District of New Jersey, entitled Searchlight Horn Company vs. Victor Talking Machine Company, comes now by N. A. Acker, Esq., its solicitor and counsel, and petitions said Court for an order allowing defendant to prosecute an appeal from said order denying said injunction and restraining order unto defendant as aforesaid, to the

Honorable, the United States Circuit Court of Appeals for the Ninth Circuit, under and according to the laws of the United States in that behalf made and provided; and also that an order be made fixing the sum of security which defendant shall give and furnish upon such an appeal, and that upon the giving of said security, further proceedings in this court shall be stayed pending the determination of said appeal by the United [121] States Circuit Court of Appeals for the Ninth Circuit.

And your petitioner will ever pray.

N. A. ACKER,

Solicitor and of Counsel for Deft.

[Endorsed]: Filed Sept. 17, 1914. Walter B. Maling, Clerk. [122]

*In the District Court of the United States, Northern
District of California, Second Division.*

No. 15,623—IN EQUITY.

SEARCHLIGHT HORN COMPANY, a Corporation,
Plaintiff,

Plaintiff,

vs.

SHERMAN, CLAY & COMPANY,

Defendant.

Assignment of Errors.

Comes now the defendant above named and specifies and assigns the following as errors upon which it will rely upon its appeal to the United States Circuit Court of Appeals for the Ninth Circuit, from

the decree or order of August 19th, 1914, refusing to enjoin and restrain complainant in the above-entitled suit.

First. That the District Court of the United States, Northern District of California, Second Division, erred in refusing defendant's said motion.

Second. That said Court erred in denying unto the defendant an order adjudging or decreeing that complainant be enjoined or restrained from any further prosecution of the suit against the said defendant in this circuit, until the determination of the suit now pending in the District Court of the United States for the District of New Jersey, between the complainant herein and the Victor Talking Machine Company, vendor of the above-named defendant.

Third. That said Court erred in not ordering, adjudging or decreeing that complainant be enjoined or restrained from bringing within its jurisdiction any other suit or suits against vendees of the said vendor, Victor Talking Machine Company, until the determination of Equity Suit No. 394, now pending in the United States District Court for the District of New [123] Jersey, between the complainant herein and the said Victor Talking Machine Company.

Fourth. That said Court erred in holding that any judgment which could be rendered in said Equity Suit No. 394, now pending in the District Court of the United States for the District of New Jersey, between the Complainant herein and the Victor Talking Machine Company, would not oper-

ate as a license to all or any of the vendees of the said Victor Talking Machine Company, to sell and dispose of the alleged infringing Phonographic Horns in the possession of the said vendees.

Fifth. That said Court erred in not holding that where a patentee, situated as complainant herein, recovers from an infringing vendor damages and profits on account of the infringement, and the judgment is paid, the vendee or vendees of such vendor has the same right to such patented article as he would have were he a licensee from the patentee.

Sixth. That said Court erred in not holding that the continued prosecution of the present suit and the right to bring and prosecute within its jurisdiction other suits against vendees of the Victor Talking Machine Company, is and would be oppressive.

Seventh. That said Court erred in refusing unto the defendant herein, the relief prayed for by its said motion, and as set forth in the petition accompanying the same.

In order that the foregoing assignment of errors may be and appear of record, the defendant presents the same to the Court and prays that such disposition may be made thereof as in accordance with the law of the United States.

Wherefore, the said defendant prays that the said Order of this Court made and entered on the 19th day of August, 1914, denying its motion to enjoin and restrain the complainant herein, be reversed and that the United States District Court, Northern [124] District of California, Second Division, be directed to enter an order setting aside the said

order or decree of August 19th, 1914.

All of which we respectfully submit.

N. A. ACKER,

Solicitor and Counsel for Defendant.

[Endorsed]: Filed Sept. 17, 1914. Walter B. Mal-
ing, Clerk. [125]

*In the District Court of the United States, Northern
District of California, Second Division.*

No. 15,623—IN EQUITY.

SEARCHLIGHT HORN COMPANY, a Corpora-
tion,

Plaintiff,

vs.

SHERMAN, CLAY & COMPANY, a Corporation,
Defendant.

Order Allowing Appeal, etc.

In the above-entitled cause, the defendant, Sher-
man, Clay & Company, having filed its Petition for
an Order allowing an Appeal from the Order of this
Court made and entered August 19th, 1914, together
with its assignment of errors:

Now, upon motion of N. A. Acker, Esq., solicitor
for defendant, it is ordered that said Appeal be, and
hereby is, allowed to defendant, Sherman, Clay &
Company, to the United States Circuit Court of Ap-
peals for the Ninth Circuit, from said decree or
order made and entered by this Court in this cause
on August 19th, denying that complainant be en-
joined and restrained from any further prosecution

of the foregoing suit and from bringing any other suit or suits within the jurisdiction of this Court against vendees of the vendor of the Phonographic Horns alleged to be an infringement of United States Letters Patent No. 771,441, and that the amount of defendant's bond upon said appeal be and the same is fixed at \$500.00, and it is further ordered that upon the filing of such security, a certified transcript of the records and proceedings herein be transmitted to the said United States Circuit Court of Appeals for the Ninth Circuit, in accordance with the Rules in Equity of the Supreme Court of the United States and the statutes made and provided.

WM. C. VAN FLEET,

District Judge.

September 16th, 1914.

[Endorsed]: Filed Sep. 17, 1914. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [126]

*In the District Court of the United States, Northern
District of California, Second Division.*

No. 15,623—IN EQUITY.

SEARCHLIGHT HORN COMPANY, a Corpora-
tion,

Plaintiff,

vs.

SHERMAN, CLAY & COMPANY, a Corporation,
Defendant.

Bond on Appeal.

KNOW ALL MEN BY THESE PRESENTS,
That Fidelity & Deposit Company of Maryland, a

corporation duly organized and existing under and by virtue of the laws of the State of Maryland, and duly licensed to transact business in the State of California, is held and firmly bound unto Searchlight Horn Company, a Corporation (complainant in the above-entitled suit), in the sum of Five Hundred Dollars (\$500.00) to be paid unto the Searchlight Horn Company, its successors and assigns, for which payment well and truly to be made, the Fidelity & Deposit Company of Maryland binds itself, its successors and assigns, firmly by these presents, sealed with its corporate seal and dated this 23d day of September, 1914.

The condition of the above obligation is such that whereas the said Sherman, Clay & Company (defendant in the above-entitled suit), has taken an appeal to the United States Circuit Court of Appeals for the Ninth Circuit, to reverse an order or decree made, rendered and entered on the 19th day of August, 1914, by the District Court of the United States, Northern District of California, Second Division, in the above-entitled cause denying unto the said defendant an order adjudging or decreeing that the above-named complainant be enjoined or restrained from the further prosecution of the above-entitled suit in the District Court of the United States, Northern District of California, Second Division, and from bringing within its jurisdiction any other suit or [127] suits against vendees of the Victor Talking Machine Company, pending the determination of Equity Suit No. 394, now pending in the United States District Court for the District of

New Jersey, between the complainant to the above-entitled suit and Victor Talking Machine Company, vendor of the Sherman, Clay & Company, *vendor of the Sherman, Clay & Company*, defendant in the above-entitled suit, for infringement of United States Letters Patent No. 771,441, granted Peter Nielsen, October 4th, 1904, for improved Phonographic Horn.

NOW, THEREFORE, the condition of the above obligation is such that if the said Sherman, Clay & Company shall prosecute its said appeal to effect and answer all costs which may be adjudged if it fails to make good its plea, then this obligation shall be void otherwise to remain in full force and effect.

FIDELITY AND DEPOSIT COMPANY
OF MARYLAND.

By PAUL M. NIPPERT,

Attorney in Fact.

[Seal] Attest: GUY LEEROY STEVICK,

Agent.

Approved Sept. 23, 1914.

WM. C. VAN FLEET,

Judge.

[Endorsed]: Filed Sep. 24, 1914. W. B. Maling,
Clerk. By J. A. Schaertzer, Deputy Clerk. [128]

UNITED STATES OF AMERICA.

District Court of the United States, Northern District of California.

CLERK'S OFFICE.

No. 15,623.

SEARCHLIGHT HORN CO.,

Complainant,

vs.

SHERMAN, CLAY & COMPANY,

Defendant.

Praeipce [for Transcript of Record].

To the Clerk of Said Court:

Sir: Please prepare transcript on appeal as follows: Bill of Complaint and Supplemental Complaint; Answer; Notice of Motion and Petition to Enjoin Prosecution of Suits for Infringement, with Affidavits and Exhibits Attached; Plaintiff's Answer and Affidavit on Defendant's Petition; Memorandum Opinion and Order Denying Motion; Petition for Appeal; Assignment of Errors; Order Allowing Appeal; and Bond on Appeal.

N. A. ACKER,

Attorney for Def.

[Endorsed]: Filed Oct. 9, 1914. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [129]

UNITED STATES OF AMERICA.

*District Court of the United States, Northern Dis-
trict of California.*

CLERK'S OFFICE.

No. 15,623.

SEARCHLIGHT HORN CO.

vs.

SHERMAN-CLAY.

Praecipe for Further Record on Appeal.

To the Clerk of Said Court:

SIR: Please add in making up record on appeal from order denying motion to suspend the stipulation of parties filed August 24, 1914 signed Miller & White for Plff. N. A. Acker & Horace Pettit for deft.

JOHN H. MILLER,

Attorney for Plff.

[Endorsed]: Filed Oct. 30, 1914. W. B. Maling,
Clerk. By J. A. Schaertzer, Deputy Clerk. [130]

*In the District Court of the United States, in and
for the Northern District of California, Second
Division.*

No. 15,623.

SEARCHLIGHT HORN COMPANY,

Complainant,

vs.

SHERMAN, CLAY & COMPANY,

Defendant.

**Certificate [of Clerk U. S. District Court] to Record
on Appeal.**

I, WALTER B. MALING, Clerk of the District Court of the United States, in and for the Northern District of California, do hereby certify the foregoing one hundred thirty (130) pages, numbered from 1 to 130 inclusive, to be a full, true and correct copies of the records and proceedings as enumerated in the praecipes for transcript of record, as the same remain on file and of record in the above-entitled cause, and that the same constitute the record on appeal to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify that the cost of the foregoing transcript of record is \$74.40; that said amount was paid by N. A. Acker, attorney for defendant; and that the original Citation issued in said cause is hereto annexed.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said District Court, this 14th day of November, A. D. 1914.

[Seal]

WALTER B. MALING,
Clerk.

By J. A. Schaertzer,
Deputy Clerk. [131]

Citation on Appeal.

UNITED STATES OF AMERICA,—ss.

The President of the United States to Searchlight
Horn Company, Greeting:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals

for the Ninth Circuit, to be holden at the City of San Francisco, in the State of California, within thirty days from the date hereof, pursuant to an order allowing an appeal, of record in the Clerk's Office of the United States District Court for the Northern District of California, Second Division, wherein Sherman, Clay & Company is appellant, and you are appellee, to show cause, if any there be, why the decree rendered against the said applicant, as in the said order allowing appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable WILLIAM C. VAN FLEET, United States District Judge for the Northern District of California, this 24th day of September, A. D. 1914.

WM. C. VAN FLEET,

United States District Judge. [132]

Reed. copy within Citation Sept. 28, 1914.

JNO. H. MILLER,

Atty. for Appellee.

[Endorsed]: No. 15,623. United States District Court for the Northern District of California, Second Division. Sherman, Clay & Company, Appellant, vs. Searchlight Horn Company. Citation on Appeal. Filed Oct. 10, 1914. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk.

[Endorsed]: No. 2519. United States Circuit Court of Appeals for the Ninth Circuit. Sherman, Clay & Company, a Corporation, Appellant, vs.

Searchlight Horn Company, a Corporation, Appellee. Transcript of Record. Upon Appeal from the United States District Court for the Northern District of California, Second Division.

Received and filed November 20, 1914.

FRANK D. MONCKTON,

Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

By Meredith Sawyer,
Deputy Clerk.

*United States Circuit Court of Appeals for the Ninth
Circuit.*

SHERMAN, CLAY & COMPANY,

Appellant,

vs.

SEARCHLIGHT HORN COMPANY,

Appellee.

**Order Extending Time to File Record and to Docket
Cause.**

Good cause appearing therefor, it is ordered that the appellant herein have to and including November 21st, 1914, within which to file its record on appeal and to docket the suit in the United States Circuit Court of Appeals for the Ninth Circuit.

Dated October 23, 1914.

WM. W. MORROW,

United States Circuit Judge, Ninth Judicial Circuit.

[Endorsed]: No. 2519. United States Circuit Court of Appeals for the Ninth Circuit. Order Under Rule 16 Enlarging Time to Nov. 21, 1914, to File Record Thereof and to Docket Case. Filed Oct. 23, 1914. F. D. Monckton, Clerk. Re-filed Nov. 20, 1914. F. D. Monckton, Clerk.

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No. 2519

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

SHERMAN, CLAY & COMPANY,
a Corporation,

Appellant,

vs.

SEARCHLIGHT HORN
COMPANY, a Corporation,

Appellee.

APPELLANT'S BRIEF

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA,
SECOND DIVISION

N. A. ACKER,
HECTOR T. FENTON,
FREDERICK A. BLOUNT,
Solicitors for Appellant.

Filed

MAY 6 - 1915

F. D. Monckton,
Clerk.

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT

SHERMAN, CLAY & COMPANY,
a Corporation,

Appellant,

vs.

SEARCHLIGHT HORN
COMPANY, a Corporation,

Appellee.

No. 2519.

APPELLANT'S BRIEF

This is an appeal, under Sec. 129 of The Judicial Code, 36 Statutes at Large 1087, U. S. Compiled Statutes of 1901 Supplement 1911, page 194, from an order of the United States District Court for the Northern District of California, Second Division, denying an Interlocutory Injunction.

HISTORY OF THE CASE.

Appellee herein—Searchlight Horn Company—on the 9th day of May, 1911, commenced an action at law, as plaintiff, in the United States District Court

for the Northern District of California, against Appellant herein, Sherman, Clay & Company, as defendant, for damages for infringement of a patent for Horns for Phonographs and Similar Machines, which said action on the 4th day of October, 1912, resulted, upon trial, in a verdict for the plaintiff.

Shortly after the verdict in the action at law just mentioned, appellee herein on November 25, 1912, commenced a suit in Equity, No. 15623 in the United States District Court for the Northern District of California, against appellant herein for infringement of said patent and for an injunction. In this suit a preliminary injunction was asked for and was granted on April 29, 1913. From the judgment of the Court below founded on the verdict in the action at law, appellant herein sued out a Writ-of-Error to this Court, and thereafter said appellant took an appeal to this Court from the order granting the preliminary injunction in the Equity suit No. 15623.

While the Writ-of-Error and the Appeal above mentioned were still pending in this Court, appellee herein, on July 29, 1913, commenced a suit in Equity, No. 394 in the District Court of the United States for the District of New Jersey, against the Victor Talking Machine Company for infringement of the same patent, as is shown by copy of Bill of Complaint, Record page 55, which said suit reached issue September 15, 1913, as will be seen by the copy of Answer of the Victor Talking Machine Company at Record page 64. Thereafter, on the 4th day of May, 1914, this Court having duly heard the Writ-of-Error and the Appeal above mentioned, affirmed the judgment of the Court below in the action at law (214 Fed. 86)

and affirmed the decree of the Court below granting the preliminary injunction in the Equity suit (214 Fed. 99).

On July 31, 1914, appellant herein filed its Petition in the Court below (Record page 31) praying for an order enjoining the appellee herein from further prosecuting said suit No. 15623, and from bringing any more suits of a like nature against dealers in Phonographic Horns supplied by the Victor Talking Machine Company until rendition of judgment of the District Court of the United States for the District of New Jersey, upon the Master's report on an accounting in the said Equity suit No. 394, then pending in New Jersey against the Victor Talking Machine Company.

Upon hearing this Petition the Court below on August 19, 1914, denied the application for such interlocutory injunction (Record page 130) and it is from this order denying said injunction that the present appeal is taken.

STATEMENT OF THE CASE.

Appellee herein, Searchlight Horn Company, the owner of the patent sued on, was, prior to May, 1908, engaged in the manufacture of the patented horns, and it sold said horns to dealers throughout the United States. It was not itself a user of said horns but derived its profit, or attempted to do so, by the manufacture and unconditional sale of said horns direct to dealers throughout the United States. Since the date above mentioned, it has not been engaged in such manufacture and sale. (See appellant's Peti-

tion, paragraphs XIII and XIV, Record page 36, and appellee's admission of same in Answer to Petition, paragraph 13, page 104.)

Appellant herein, Sherman, Clay & Company, is a dealer in music and musical instruments, and is one of many customers of the Victor Talking Machine Company, and all the phonographic horns complained of as infringements in the present suit were purchased by said Sherman, Clay & Company from said Victor Talking Machine Company. (Record page 33, paragraphs VII and XII, Appellant's Petition.)

This is not denied by appellee, its Answer to paragraph VII (Record page 98, section 7) having reference only to whether said Sherman, Clay & Company is one dealer of many hundreds or one of ninety; but later in its Answer to paragraph XII (Sec. 12, Record pages 103-104) appellee admits the same.

The Victor Talking Machine Company, the defendant in the New Jersey suit, No. 394, sells the phonographic horns to its customers, amongst whom is the appellant herein, and the horns complained of as infringements in the New Jersey suits are the horns sold by the Victor Talking Machine Company to its various customers, and amongst the horns so complained of are those sold to the appellant herein; and those sold to Wiley B. Allen & Company, another purchaser from the Victor Talking Machine Company, the defendant in an action at law, No. 1625, brought by appellee herein in the Southern District of California, Southern Division (Record page 34, paragraph IX); and furthermore, following along the same line of statement, if other suits were brought by appellee herein against other customers of the

Victor Talking Machine Company, the horns complained of would be horns included within those complained of in the New Jersey suit against the Victor Talking Machine Company, and that if threatening letters were sent by appellee herein to other customers of the Victor Talking Machine Company, such letters would refer to complaints about such horns as are included in the New Jersey suit. In this connection it is fairly inferable from the record that other suits and threats of suits against other customers of the Victor Talking Machine Company are not only possible but quite probable.

Record pages 34, 100, 101, 102.

It should now be clear that the Victor Talking Machine Company is the source from which spring the infringements involved in the whole matter, and that, assuming infringement, this Company in selling the horns to its various customers, throughout the United States, has usurped the place of the appellee herein, Searchlight Horn Company, which, if not thus driven out, would presumably be selling the patented horns to these same purchasers. This idea is clearly conveyed in another form of expression found in the Petition herein; namely, that all the horns which have been and may be complained of as infringements in suits already brought or to be brought against customers of the Victor Talking Machine Company are horns which are subject to the accounting in the suit pending in New Jersey against the Victor Talking Machine Company.

(Record page 35, paragraph XI.)

This is admitted in appellee's Answer to the Petition herein, except in so far as the Statute of Limitations may affect this to a slight extent.

(Answer to Petition, Record page 103.)

It is also clear that upon accounting for the infringing horns and satisfying any judgment which may be rendered in the New Jersey case, against the Victor Talking Machine Company, the horns so accounted and paid for by the Company will be released from the patent monopoly and the customers of the Company who bought said horns will not be liable to appellee herein.

(Record page 36, paragraph XIV.)

This is also admitted in appellee's Answer to the Petition herein, except in so far as the Statute of Limitations may affect it to a slight degree.

(Answer to Petition, Record page 106.)

ARGUMENT.

The seven assignments of error (Record pages 135-137) are but variations of one idea and need not be separately treated. They are all included in the sole contention that a state of facts is here presented which brings the case fully within the now well established law on the subject.

This law has lately found its final expression in a well considered case recently decided by this Court, and so completely does the doctrine of that case cover the present case that our task is simplified and is reduced to the mere necessity of brief comparison.

It is our contention that the case of *Stebler v.*

Riverside Heights Orange Growers Association, et al., 214 Fed. 550, decided May 30, 1914, by this Court, completely controls the present case, and must result in reversing the Court below.

The Stebler case marks an advance in patent law so clearly logical and inevitable as to excite wonder that its generic principle was not sooner recognized and announced. This advance is true, notwithstanding that in the memorandum opinion of the Court below in the present matter, its doctrine seems to be regarded as a restricted species, thus giving opportunity for distinctions which, we respectfully submit, are without difference.

To come at the matter speedily, we contend that the doctrine in the Stebler case, as announced by this Court, is generic, and covers any set of facts and circumstances in which there is a suit against a primary or main infringer against whom a judgment and recovery may be had which will give to the patentee all the latter could have had, or to which he would be entitled under his patent, if such infringement had not occurred; and the patentee's full measure of compensation is had and expressed when he recovers from, or is entitled to recover from the primary or main infringer, the damages he has suffered, and the gains, profits and advantages the infringer has made from his infringing acts. The foundation of this lies in the fact that when he makes such recovery, the infringing articles are released from the patent monopoly, just as fully as if he had sold them himself, and he cannot follow them beyond the primary or main infringer. This being true, and the doctrine of the Stebler case being as broad and gen-

eric as we read and state it, it makes not one bit of difference by what name we call the primary or main infringer, whether he be a manufacturer, or a seller; and it makes no difference whether the ultimate infringers be sellers or users.

If there be a fountain head from which *full compensation* can flow, and if the patentee seek his compensation from that source, he can, under the principle and doctrine of the Stebler case, be restrained from seeking such compensation at the same time from the numerous rivulets which have their source in such fountain head; at least, until such time as he shall find the head exhausted. There is no point to be made in “manufacturer” nor in “user,” It so happened in the Stebler case that these were the forms or species appearing, and so also in previous cases, more or less approaching the doctrine under consideration; because those forms are the most natural, the most common. A manufacturer is generally the primary or main infringer; and a user is commonly the ultimate infringer. Because of what opposing counsel has called a “tactical” advantage, it is common to sue a user, and quite frequently, in an excess of “tactical” advantage, to sue a goodly number of users; and this is allowable. But when he forgets himself and sues the manufacturer, whether before or after he sues the users, and all the suits are pending, then Equity will interpose its injunction to the suits against the users, and require him to seek his compensation first from the manufacturer.

The reasons for this as announced by this Court in the Stebler case are such as apply with equal force, are just as cogent, just as logical, just as true, in

case the *main* infringer be a wholesale seller, and the ultimate infringers be jobber sellers, or retail sellers, *provided* the circumstances of the case be such that the patentee can recover, and seeks to recover from the main infringer his *full compensation*.

If we can show this, it is clear that the Court below is in error, for by reference to the Memorandum Opinion (Record pages 130-133) it will be seen that though His Honor, Judge Van Fleet, was, at first, upon the argument of the Petition, impressed with the applicability of the principles in the Stebler case (he cited only the Stebler case in the Court below, 211 Fed. 985, though the appeal therefrom had at that time been decided but not published) he afterwards concluded that his first impression was erroneous, and thereupon denied the Petition upon the distinction that the Stebler case presented a manufacturer and numerous users, while the present case presents a main seller, and numerous resellers who purchase from the main seller.

Let us now see whether this is, in reality, a difference which means a departure from the doctrine or principle announced by this Court in the Stebler case.

The Court says:

“The plaintiff is a manufacturer and seller of the machines covered by his patent”—

This was true of the present appellee, the Searchlight Horn Company.

And the Court further says:

“—and the sole profits which he derives from his

patent are those arising from the manufacture and sale of the machines covered thereby."

True also of Searchlight Horn Company.

Further the Court says:

"The suits brought by the plaintiff, and sought to be enjoined by the petition of the defendants, are against users of machines which had been manufactured and sold by the defendants prior to the rendition of the opinion of this Court and the entry of the interlocutory decree in the lower Court pursuant thereto."

In the present case the suits sought to be enjoined are against resellers of the horns purchased from a main seller.

The Court goes on to say:

"The theory of the defendants' petition is that, under the accounting ordered in the interlocutory decree entered in the Court below, the plaintiff would receive full compensation for all infringing machines which had been manufactured and sold by the defendants in violation of the plaintiff's patent; that such machines would be thereafter released from any claim on the part of the plaintiff by virtue of his patent; and that the plaintiff, pending the entry of the final judgment against the defendants in this suit, is not entitled to bring or maintain any suits against the persons or corporations, customers of the defendants, to whom the infringing machines had been sold by the defendants, and who were users of them at the time of the institution of the various suits sought to be enjoined."

The theory of the defendant's petition in the present case is that under the accounting prayed for and possible, in the pending suit against the Victor

Talking Machine Company in New Jersey, the Searchlight Horn Company, appellee herein, will receive full compensation for all infringing horns sold by the Victor Talking Machine Company in violation of appellee's patent; that such horns would be thereafter released from any claim of appellee; and that appellee, pending the entry of final judgment against the Victor Talking Machine Company in the pending New Jersey case, is not entitled to bring or maintain any suits against customers of the Victor Talking Machine Company (in the present case, Sherman, Clay & Company) to whom the infringing horns had been sold by the Victor Talking Machine Company, and who were sellers of them at the time the various suits were brought.

These theories are manifestly alike. Verbally they differ in the use of manufacturer and user on the one hand, and seller and purchaser on the other hand. But the *essential* fact of each statement of the theory is identical, namely, that if *full compensation* may be had from a central or main infringer, the infringing devices are released from the monopoly of the patent, and cannot be followed beyond the main infringer. What possible distinction in this principle can be founded upon whether the main infringer be a manufacturer or a seller, or whether the succeeding infringer be a user or a reseller? None, we say, for these are but words; the real thing is the *full compensation*, resulting in release from the patent monopoly.

Continuing, the Court in the Stebler case says:

“The defendants were manufacturers of and general dealers in machinery of various kinds used in the business of fruit packing, and it is

not to be denied that the institution and prosecution of the suits set forth in the petition, and similar suits, against customers of the defendants, would have the effect of harassing and annoying the defendants' customers; that they would be put to heavy expense; and that the probable outcome would be the loss to the defendants of the patronage of such customers and the consequent depreciation and destruction of their business as dealers in packing house machinery and supplies."

Is this not true of the present case? Is it not true that frequently in patent cases, it is thought a terrifying pressure on users and customers is a wholesome thing, one well adapted to bring the main infringer to time, a "tactical" advantage as counsel says. The number of these tactical suits is merely a matter of degree. In the Stebler case the maximum was, perhaps, reached. In the present case we find two such suits against customers, and three letters called by counsel "warnings"; but the potentiality of others is not eliminated.

Judge Morrow continues:

"The bill of complaint filed by the plaintiff in this case asked that the defendants be decreed to account for and pay over unto the plaintiff the gains and profits realized by the defendants from and by reason of the infringement, and further, that the defendants be decreed to account for and pay over unto the plaintiff the damages suffered by him by reason of the infringement."

In the case now pending against the main infringer, Victor Talking Machine Company, in New Jersey, the prayer is the same, that is, for profits and damages. The prayer reads (Record page 62):

“Third—That it be ordered, adjudged and decreed that the plaintiff have and recover from the defendant the profits realized by the defendant and the damages sustained by the plaintiff from and by reason of the infringement aforesaid.”

This Court in the Stebler case continues:

“There was thus distinctly provided a method whereby the plaintiff might recover all losses suffered by him by reason of the infringement of his patent—those in the nature of damages as well as those in the nature of profits received by the infringing defendants.”

Precisely the same method is provided in the pending case against the Victor Talking Machine Company.

To quote further:

“There is no controversy in the case as to the financial ability of the defendants to respond to whatever judgment might be finally rendered against them upon the final hearing of the case.”

There is no controversy here as to the financial ability of the Victor Talking Machine Company to respond to judgment.

The Court continues:

“To permit the plaintiff, under such circumstances, to institute and maintain suits against the customers of the defendants, to whom the infringing machines have passed, would, it is obvious, be harassing, annoying, and expensive, and would place the plaintiff in a position to maintain the suits to recover full compensation in a double proportion for the losses suffered by him by reason of the infringement.”

This is true of the present case.

Judge Morrow continues:

“The plaintiff derives his profits from the the manufacture and sale of the fruit grading machines covered by the patent. These profits consist of the difference between the cost of manufacture and the prices for which he sells the machines. These profits are therefore the only compensation which he receives for the machines manufactured and sold by him during the entire life thereof. When final judgment is entered against the defendants pursuant to the accounting which has been ordered against them, the plaintiff will receive thereunder full compensation for the use of the machines by the vendees of the defendants herein for such period as they are capable of being used, in the same manner and to the same extent as he would have done had he sold the machines himself. This being true, a decree against the defendants for the profits which they received by reason of the sales of the infringing machines, together with whatever damages the plaintiff may have suffered by reason thereof, must be held to vest the right to the use of the machines in the defendants’ vendees free from any further claim by the patentee.”

Here we find finally and fully stated the idea of *full compensation* resulting in a release of the infringing devices from the monopoly.

It cannot be said that a material difference exists between a *manufacturer* infringer paying the full compensation and a seller infringer doing so, nor between the release of the infringing devices in the hands of one form of customer, namely, a user, and another form of customer, to-wit, a reseller. The essential things are *full compensation* and *release*, and it is immaterial from what source the former

comes, or in whose hands the latter is effective. If these are the essential things, it is clear that the statement of the Court below that all the defendants to these suits are guilty of precisely like acts of violation of plaintiff's rights, differing only in degree but not in kind, is wholly beside the mark. It may be true, and they may be, as the learned Judge says, both tort-feasors and equally liable to a suit by plaintiff at his pleasure or election, and yet when plaintiff has *elected to sue both* and can get from the main tort-feasor *full compensation*, he is not permitted to continue his suits against the purchasers of the main tort-feasor, nor to bring other suits against other purchasers of the main tort-feasor, whether said purchasers be users or resellers, for in either case the infringing devices purchased by them and settled for by the main tort-feasor will be released from the patent monopoly. Nor does it matter, as the Court below seems to imply, that in the present case the suits against the purchaser were brought before the suit against the main infringer. This was the case in *Kelley v. Ypsilanti Mfg. Co.*, 44 Fed. 19, cited by this Court in the Stebler case. Notwithstanding the supposed distinction between manufacturer and user, and seller and reseller, which is clearly the basis for the denial of the Petition by the Court below, there still seems to have been an undercurrent of doubt running in the minds, both of the Court and opposing counsel, as to the reality of the distinction, for we find injected into the Answer of Appellee and in the memorandum of the Court, the point of the Statute of Limitations.

Having brought the suit against the main in-

fringer, Victor Talking Machine Company, after those brought against the present appellant, and Wiley B. Allen & Company, customers of Victor Talking Machine Company, it is pointed out that the six year Statute of Limitations will not run as far back in the main-infringer case as in the customers' cases, and that, therefore, appellee can not secure compensation from the main infringer for all the horns for which the customers will have to account for. This seems to us more a matter of detail degree than of principle, and his Honor in the Court below seems to connect this point up with what appears to us to be his doubt on the main issue, for he says:

“Could plaintiff have a full recovery in the New Jersey case for all the damages suffered from the acts of the defendant here, *there would perhaps be more analogy* between this case and those relied on, but the facts show that by reason of the intervention of the Statute of Limitations, the same extent of relief sought against the present defendant under the allegations of the bill could not be had against the New Jersey defendant.”

We recognize, of course, that the smallness in reality of the difference in the compensation due to this fact, has nothing to do with the soundness of the point, if it be sound at all. But we submit that it has nothing to do with main principle and doctrine announced by this Court in the Stebler case. It must be borne in mind that our Petition is *not for a dismissal* of the suits against the customers, nor for a *perpetual* injunction against their further prosecution, nor for a *perpetual* injunction against the bringing of more similar suits, but our Petition prays for a stay in

these matters, only until the recovery in the main suit in New Jersey. If that recovery is short of *full compensation* for any reason whatsoever, the suits against the customers may continue for any difference due to the Statute of Limitations. But, in a broad sense, if the beneficent doctrine of the Stebler case, a doctrine founded in Equity and good conscience, is to be subverted because appellee delays to bring his suit against the main infringer (and he may so delay for one day only) then this doctrine is in vain.

We, therefore, submit that the present appeal is well taken, in that, under the law as announced by this Court in the Stebler case, the Court below should have granted our Petition for an Injunction.

Respectfully submitted,

N. A. ACKER,
 HECTOR T. FENTON,
 FREDERICK A. BLOUNT,

Solicitors for Appellant.

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No. 2519

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

February Term 1915

SHERMAN CLAY & COMPANY,
Appellant,

VS.

SEARCHLIGHT HORN COMPANY,
Appellee.

BRIEF FOR APPELLEE.

JOHN H. MILLER,
Attorney for Appellee.

Filed this.....*day of March, 1915.*

FRANK D. MONGKTON, *Clerk.*

By.....*Deputy Clerk.*

MAR 13 1915
F. D. Mongkton,
Clerk.

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<i>Appellee.</i>	

BRIEF FOR APPELLEE.

Preliminary Objection.

The matter before the court in this case is stated by appellant to be an appeal from an order by the District Court of the United States for the Northern District of California, denying appellant's motion for an injunction staying the further prosecution of the case until the final determination of a certain suit pending in New Jersey. The petition for an order allowing the appeal specifies an order made on the 19th day of August, 1914 (Record 134), and the assignment of errors (Record 135) and the

order allowing the appeal (Record 138), state that the appeal is taken from said order entered on August 19, 1914. But the record fails to contain any such order. It is true that the record (page 130) contains a "memorandum opinion", which was rendered by the court on August 19, 1914, giving the reasons why the defendant below was not entitled to the order asked for; but the record contains no order denying the motion. *Non constat* that any such order was ever entered. Certainly there is none in the record. The "opinion" of the lower court is not an order. It is merely a statement of the reasons why an order should be entered in accordance with the opinion. Consequently, so far as the record shows, this appears to be an appeal from some kind of an order which does not appear in the record, and which does not affirmatively appear ever to have been entered at all. Of course this court will not consider an appeal from the opinion of the lower court. Under these circumstances, there is nothing for this court to consider on this appeal, and we ask that the appeal be dismissed for that reason.

Statement of Facts.

If, however, the court concludes to consider this appeal on the merits, then we submit the following. The facts are these. The suit is in equity to enjoin the infringement of a patent for a phonograph horn. Certain unknown manufacturing corporations in

the Eastern states manufactured the infringing horns and sold them to the Victor Talking Machine Co., a corporation, in New Jersey. The Victor Co. then delivered the horns to its distributing agent at San Francisco, Sherman Clay & Co., the defendant herein. Defendant then sold the horns to retail dealers throughout the Pacific Coast, and these retail dealers sold them to the ultimate users (Record 97, 104 and 131). Under these circumstances, plaintiff first instituted an action at law against Sherman Clay & Co. in the Northern District of California to recover damages for past infringement and secured a judgment which was affirmed by this court on writ of error (*Sherman Clay & Co. v. Searchlight Horn Co.*, 214 Fed. 86).

As Sherman Clay & Co. continued the infringement after the judgment, plaintiff instituted this present suit in equity on November 25, 1912, to obtain an injunction restraining further infringement, and on motion duly made a preliminary injunction was granted which was also affirmed by this court on appeal (214 Fed. 99). Both of the aforesaid cases were defended by the Victor Talking Machine Co. under a guarantee from that company to protect its distributers against all infringement suits. Consequently, the Victor Co. is bound by the decisions in those cases. These two suits were brought as test cases, with the expectation that a favorable decision therein for plaintiff would terminate the controversy and induce a settlement by the Victor Co. without further litigation.

While these two suits against Sherman Clay & Co. were pending, the statute of limitations was running against the Victor Co., and the suits were so long delayed by reason of dilatory tactics on the part of the defendant that as a matter of precaution plaintiff filed a bill in the United States District Court of New Jersey against the Victor Co. in order to stop further running of the statute of limitations.

The case at bar came up for trial in due course prior to the decisions of this court in 214 Federal Reporter, and at the request of defendant's attorney the trial was continued until the decision of this court could be rendered. The decisions of this court were rendered on May 4, 1914. Thereupon the trial of the present case was set for August 25, 1914, without any objection from defendant. Before the case was reached for trial, defendant below made its motion for an order enjoining the further prosecution of the suit and also from the institution of any other suit against dealers of the Victor Co. until the final determination of the suit which the plaintiff had brought in the District Court of New Jersey against the Victor Talking Machine Co. In other words, after the matters in controversy had been thoroughly tried out on the merits by the lower court and affirmed on writ of error by this court, the defendant asked the court to tie up the California litigation indefinitely until the New Jersey case against the Victor Co. could be tried and determined, the theory being that in the accounting

against the Victor Co. in New Jersey the infringing machines involved in the present case against Sherman Clay & Co. will be accounted for and compensation awarded, and as a result thereof that the present suit against Sherman Clay & Co. will have to be dismissed.

The lower court denied this motion and rendered a memorandum opinion, which appears between pages 130 and 133 of the record. From this opinion, which appellant's counsel call "an order denying an injunction", the present appeal is taken.

In reference to the facts occurring after the denial of this motion, we beg to state as follows: When the case was reached for trial on August 25, 1914, the day on which it was set for trial, at the urgent request of counsel for the defendant, it was agreed that the trial of the case should be continued until the November, 1914, term of the lower court. This continuance was granted by us, but at the same time the matter was fully covered by the following stipulation between the parties, which appears at page 129 of the record, viz.:

"STIPULATION FOR CONTINUANCE.

"It is hereby stipulated and agreed by and between the parties to the above-entitled suit that the trial of the said case which has heretofore been set for August 25, 1914, be postponed until the November, 1914, term of said court, and that at said November, 1914, term the case shall be tried without further objection from defendant or any further motion for a continuance.

“And in consideration of the making of the above stipulation on the part of the plaintiff’s attorney, it is stipulated and agreed that the defendant in the case of Searchlight Horn Co. v. Victor Talking Machine, No. 394, in the District Court of the United States for the District of New Jersey, shall not without the written consent of the plaintiff’s attorney bring that case on for final hearing or take any step in that direction prior to the final hearing of the above-entitled case at the time provided for in the above stipulation.

MILLER & WHITE,
Attorneys and Counsel for Plaintiff in
both said cases.

HORACE PETTIT,
N. A. ACKER,
Attorneys and Counsel for Defendants
in both said cases.

Dated August 19, 1914.”

If the court desires to know what occurred at the said November, 1914, Term of the Court, we state the following as the facts. The case was set regularly for trial on November 25, 1914. The day before the trial, the defendant’s chief attorney who had arrived from New York for the purpose of participating in the argument of the case, stated to us that in his view the case was one that should be settled amicably without further litigation, and that, if we would consent to a continuance of the case for the term, he would return to New York and advise his clients to settle the case amicably, if such settlement could be agreed on between the parties, and he invited the writer of this brief to go on to New York for the purpose of negotiating a

settlement. Thereupon we agreed to a continuance of the case for the term, and later the writer of this brief proceeded to New York and entered into negotiations with the Victor Talking Machine Co. and the Thomas A. Edison, Inc., for settlement of the cases. These negotiations proved abortive because of the fact that a mutually satisfactory sum could not be agreed upon, and the writer of this brief then returned to California for the trial of the case, which has been set for March 31, 1915.

These last stated facts do not appear in the record, and as stated above, we are merely giving them in the event that this court may desire to know them. If the court does not desire to know them, then they may be disregarded. If the court does desire to know them, we have prepared an affidavit detailing the same.

Argument.

I.

Appellant relies for a reversal upon the case of *Stebler v. Riverside*, 214 Fed. 550; but we insist that said case is wholly different from the one at bar, and for that reason is not controlling. The facts of that case were there: Stebler, the plaintiff, and Parker, a defendant, were rival manufacturers of a machine called a fruit grader used extensively in Southern California by fruit packers for handling and packing oranges. Stebler sued Parker for manufacturing and selling an infringing machine

and on final hearing secured an interlocutory decree for an injunction and an accounting. But instead of proceeding with this accounting, Stebler instituted 31 suits in equity against 31 of Parker's customers, who were using the infringing graders, and asked for injunctions prohibiting said 31 users from further use of those said 31 infringing machines and also for an accounting of damages and profits arising from use of said 31 machines by said 31 users. The lower court held that Stebler could obtain full compensation in respect of said 31 machines from Parker by proceeding with the accounting and that after obtaining such compensation, the 31 machines in the hands of the 31 users would be freed from the monopoly of the patent on the ground that there could not be a double recovery, that is to say, one against Parker and another against the user. Under such circumstances, the court held that these 31 suits against the users were vexatious and oppressive, and an injunction was granted against their further prosecution until the final determination of the parent case against Parker; but Parker was required to furnish a heavy bond for the payment of such damages as might be awarded against him on the accounting.

The facts of our case are wholly different. There is no controversy between rival manufacturers. The infringing horns were made by certain unknown manufacturers in the Eastern states and by them sold to the Victor Talking Machine Co. in the Eastern states, after which the Victor Talking Ma-

chine Co. delivered the horns to Sherman Clay & Co., their Pacific Coast distributing agent, and Sherman Clay & Co. then sold the horns to the retail dealers throughout the Pacific Coast, which retail dealers sold them to the ultimate users. The facts, therefore, which differentiate this case from the Stebler case are as follows:

A.

STEBLER'S CASE WAS ONE BETWEEN RIVAL MANUFACTURERS AND USERS.

Both Stebler, the plaintiff, and Parker, the defendant, were manufacturers, that is to say, the primary source from which the good emanated. Stebler elected to enjoy his patented invention by manufacturing the machines and selling them to users. He granted no licenses to others to manufacture, but reserved that right as a close monopoly for himself. Under this procedure, when he sold a patented grader, the same was freed from the monopoly of the patent and the purchaser acquired a license to use it perpetually. Consequently, when Parker, the infringer, intervened and sold infringing graders, he thereby, in contemplation of law, prevented Stebler from making those sales. Thereby Stebler lost those sales, and the sole and only damage he suffered thereby was the loss of the profits which he would have made if he himself had made those sales. Under this theory the court held that Stebler was entitled to recover from Parker the damages and profits occasioned by the manufacture

and sale of the infringing machines, and that when such compensation had been made, then the infringing machines would be released from the monopoly of the patent as effectually as if Stebler had sold them himself.

In its decision of the case, at page 553, this court refers to the interlocutory decree awarding damages and profits, and then says:

“There was thus distinctly provided a method whereby the plaintiff might recover all losses suffered by him by reason of the infringement of his patent—those in the nature of damages as well as those in the nature of profits received by the infringing defendants. * * * Plaintiff derives his profits from the manufacture and sale of fruit grading machines covered by the patent. These profits consist of the difference between the cost of manufacture and the prices for which he sells the machines. These profits are therefore the only compensation which he receives for the machines manufactured and sold by him during the entire life thereof. When final judgment is entered against the defendants pursuant to the accounting which has been ordered against them, the plaintiff will receive thereunder full compensation for the use of the machines by the vendees of the defendants herein for such period as they are capable of being used, in the same manner and to the same extent as he would have done had he sold the machines himself.”

But our case is wholly different. Neither the plaintiff nor the defendant is a manufacturer, nor is the defendant's principal, the Victor Talking Machine Co., a manufacturer. On the contrary, the

Victor Talking Machine Co. buys the infringing machines from certain unknown and unnamed manufacturers in the East. These infringing machines are then delivered to Sherman Clay & Co., the Pacific Coast distributing agent of the Victor Co., and they are then sold by Sherman Clay & Co. to retail dealers, who in turn sell them to the ultimate users. Both Sherman Clay & Co. and the Victor Co. are "re-sellers", and the doctrine of the Stebler case does not apply to "re-sellers". This was admitted by Parker's attorney in his brief filed in that case in this court. At page 28 thereof he says:

"Settlement with the infringing manufacturer would not release the profit due from the re-seller of an infringing device."

And again, at page 29, where he differentiates the case of a re-seller from that of a user, he says:

"The owner of a patent is entitled to a recovery against the re-seller for profits derived therefrom in addition to a recovery against the infringing manufacturer of the article manufactured for re-sale. * * * This right we have never questioned nor do we do so at this time."

The attorney for Parker in the Stebler case who used the above language was Mr. N. A. Acker, who is the present attorney for Sherman Clay & Co. in the case at bar.

Judge Van Fleet in the lower court also took the same view. After stating the facts of the Stebler case he proceeded as follows at page 131 of the record:

“But that is not this case. The New Jersey suit is not against the manufacturer or primary infringer. The defendant in that case is itself a buyer from the manufacturer, who sells or ships the devices in suit to the defendant here and other dealers for re-sale to still other and smaller dealers, who in turn sell to the ultimate users. The defendant in this case is therefore a distributor or dealer in the alleged infringing articles standing on a precisely similar plane under the law as the defendant in the New Jersey suit, and is not a user; and the object of this suit is to enjoin such sale and distribution, with the recovery of damages for the infringing acts, precisely as is the object of the suit against the New Jersey defendant. In other words, the defendant in this case and the defendant in the New Jersey case are guilty of precisely like acts of violation of plaintiff’s rights, differing only in degree but not in kind. They are both tort-feasors and are equally liable to a suit by plaintiff at its pleasure or election. Under these circumstances the plaintiff was entirely within its rights in bringing this action and maintaining it; and the suit here having been first brought, and this court having thereby first obtained jurisdiction, and the cause being now ready for trial, and moreover, as appears from the showing, defended by the same party who is defendant in the New Jersey suit, there is nothing presented in the cases relied on which in equity or good conscience should dictate a postponement to await the disposition of the case against one standing in substantially the same relation to the subject-matter.”

This ruling is in accordance with the doctrine of the Supreme Court announced in *Callaghan v. Myers*, 128 U. S. 617, relating to a copyrighted book.

The court held that the plaintiff was entitled to enjoin the re-sale of the infringing books notwithstanding the fact that those specific books had already been accounted for by the manufacturer, holding that the plaintiff was twice injured, first by the original sale of the manufacturer and then by the re-sale of the dealer. Applying this rule to the case at bar it is apparent that we were injured by the sales by the Victor Co. to Sherman Clay & Co. and can enjoin future recurrences of such sales in our suit against the Victor Talking Machine Co. And we were also injured by the re-sale of the articles by Sherman Clay & Co., and can prevent the recurrence of such re-sales in our suit against Sherman Clay & Co. In other words, our cause of action against the Victor Co. is to prevent future sales, and our cause of action against Sherman Clay & Co. is to prevent future re-sales. The matter of damages and profits for horns sold in the past is merely incidental and subsidiary to the main cause of action, and while we can not have a double recovery in respect of horns already sold, that is a matter to be considered on the accounting and does not interfere with our cause of action for an injunction prohibiting future sales.

We commend to the court careful consideration of the case of *Kryptok Co. v. Stead Lens Co.*, 190 Fed. 767, decided by the court of appeals of the Eighth Circuit. It seems to us to cover the case in hand completely.

Other cases in point are:

Kelly v. Ypsilanti, 44 Fed. 19;
Westinghouse v. Mutual Life, 129 Fed. 213;
Philadelphia v. Edison, 65 Fed. 551;
New York v. Schwarzwold, 58 Fed. 577;
Gamewell v. Star, 199 Fed. 188.

B.

NEITHER IS THE SEARCHLIGHT HORN CO. A MANUFACTURER AND SELLER OF THE PATENTED DEVICE.

The fundamental theory of the Stebler case is that both plaintiff and defendant were manufacturers. Consequently, in order that that case may fit the one at bar, it must be made to appear that the Searchlight Horn Co. is a manufacturer of the patented device and derives its sole profit from such manufacture and sale to users. This much is beyond doubt.

The Searchlight Horn Co. is not a manufacturer. It appears that prior to May 1, 1908, the Searchlight Co. attempted to manufacture and sell to users, but the infringing competition was so fierce that its business proved to be a disastrous failure and was permanently discontinued at a loss of some \$40,000, which disastrous result was caused by the infringing acts of the Victor Talking Machine Co. and other phonographic companies (Record 104-5). *At no time since May 1, 1908, has the Searchlight Horn Co. been a manufacturer. It is not now a manufacturer.* It does not elect to enjoy its patent

by endeavoring to keep a monopoly of manufacture and sale. It tried that once and suffered financial ruin. Since then, it has been engaged in endeavoring to compel infringers to settle for their misdeeds. Under these circumstances it is idle to assume, as is assumed by appellant's counsel, that if the infringing horns had not been sold by Sherman Clay & Co. to their customers, they would have been sold by the Searchlight Horn Co. Seven years ago the Victor Talking Machine Co. and the other phonographic companies, by reason of their wilful and deliberate infringement of this patent, wrecked the business of the Searchlight Co., entailing upon the company a loss of some \$40,000, and after having accomplished that result and thereby prevented the Searchlight Horn Co. from resuming business, they come into a court of justice and blandly assert that if Sherman Clay & Co. had not sold its infringing horns the Searchlight Horn Co., a bankrupt concern, which is not in business at all, would have made those sales. A simple statement of the contention carries its refutation, and this clearly differentiates the case at bar from Stebler's case.

C.

THE STEBLER CASE RELATED SOLELY TO COMPENSATION FOR 31 SPECIFIC MACHINES AND NOT TO AN INJUNCTION AGAINST FURTHER MANUFACTURE OF SIMILAR MACHINES.

A most casual reading of the decision of this court in the Stebler case (214 Fed. 550) and of the

decision of the lower court in 211 Fed. 985, proves this contention. Parker had sold 31 fruit graders to 31 different fruit packers, who were using those graders, and the object of the 31 suits was to prevent further use of those specific 31 graders and to recover damages and profits for the past use. There was no pretense that the 31 users were threatening to manufacture any graders or to purchase from a manufacturer any other graders. The sole offense was the use of 31 specific graders. But such is not the case here. There is no controversy as to any specific horns. The object of the suit against Sherman Clay & Co. is to obtain an injunction preventing them from the further sale of any horns similar to those theretofore sold by them and held to be infringements. Damages for the specific horns already sold by Sherman Clay & Co. have been awarded to the plaintiff in the action at law against Sherman Clay & Co. Those specific horns have been thereby eliminated from the controversy, so far as any damages in respect of them are concerned. It is not for having sold those specific horns that the present suit was commenced. The present suit was commenced because Sherman Clay & Co. continued to sell other infringing horns after judgment had been awarded for those theretofore sold, and it was for the purpose of preventing such further infringement that this suit was commenced. Its sole and only foundation is to obtain an injunction against further infringements. It is true that incidentally plaintiff will be entitled to an accounting of dam-

ages and profits for such horns as may have been sold by defendant after the action at law; but that is purely an incident. The ground of jurisdiction in equity for infringement of a patent is laid down by section 4921 of the Revised Statutes, which reads as follows:

“The several courts vested with jurisdiction of cases arising under the patent laws shall have power to grant injunctions according to the course and principles of courts of equity, to prevent the violation of any right secured by patent, on such terms as the court may deem reasonable; and upon a decree being rendered in any such case for an infringement the plaintiff shall be entitled to recover, in addition to the profits to be accounted for by the defendant the damages the complainant has sustained thereby; and the court shall assess the same or cause the same to be assessed under its direction.”

The subject of equity jurisdiction in patent cases is discussed at length in the case of *Root v. R. R. Co.*, 105 U. S. 189, from which it will appear that our position is correct, viz.: *that the jurisdiction in equity is dependant solely upon the right to an injunction against further infringements*, and that an accounting of damages and profits is purely an incidental matter, based on the general proposition that when equity acquires jurisdiction of a controversy it will proceed to administer full relief, even though a portion of such relief may be of a purely legal character cognizable in an action at law. These considerations differentiate the case at bar from *Stebler's case*, and on a well recognized princi-

ple of equity jurisprudence show that plaintiff here could not obtain the full relief in a suit against the Victor Co. which it could obtain and which it is entitled to obtain in the suit against Sherman Clay Co. The whole theory of appellant is that in the suit against the Victor Co. we could obtain the full and entire compensation which we are seeking to obtain against Sherman Clay & Co. But this is error. In the suit against the Victor Co. we could not obtain an injunction prohibiting Sherman Clay & Co. from further infringement, which is the object of the present suit. We might obtain an injunction against the Victor Co. from further infringements, but that would leave Sherman Clay & Co. free to infringe by either manufacturing horns themselves or obtaining them from sources other than the Victor Co.

D.

FURTHERMORE, THE STATUTE OF LIMITATIONS HAS INTERVENED IN BEHALF OF THE VICTOR CO. IN RESPECT OF A PORTION OF ITS INFRINGEMENT AND THE HORNS SOLD BY THEM DURING THAT PERIOD TO SHERMAN CLAY & CO. CAN NOT BE RECOVERED FOR, WHEREAS SUCH HORNS CAN BE RECOVERED FOR IN THE PRESENT CASE.

In other words, we can not recover full compensation for infringement of all of our rights in the Victor suit. This results from the fact that the suit against Sherman Clay & Co. was brought first and the suit against the Victor Co. was brought later. The statute of limitations is six years; conse-

quently, some of the machines accountable for in the Sherman Clay & Co. suit will be barred by the statute of limitations in the Victor suit, thus showing that full compensation can not be obtained in the Victor case. On this point Judge Van Fleet says in his decision, at page 132 of the Record:

“But the facts show that by reason of the intervention of the statute of limitations the same extent of relief sought against the present defendant under the allegations of the bill could not be made against the New Jersey defendant.”

The theory of appellant is that in the New Jersey case plaintiff can recover the full and entire compensation which it can recover in the case against Sherman Clay & Co.; but it will be seen from the above that this is erroneous as to a portion of the horns sold by the Victor Co. to Sherman Clay & Co. Consequently, this is another fact differentiating the case from Stebler's case.

E.

AND STILL FURTHER, EVEN IF THE PLAINTIFF WERE ENTITLED TO A JUDGMENT FOR FULL COMPENSATION IN THE SUIT AGAINST THE VICTOR CO., WHAT ASSURANCE OR SECURITY IS THERE THAT THE PLAINTIFF WOULD EVER BE ABLE TO REALIZE ON SUCH A JUDGMENT?

It is true that appellant alleges that the Victor Co. “is” able to respond to any damage which may be awarded against it, and the appellee agrees to such proposition. But this relates only to the pres-

ent ability of the Victor Co. Who is there can prophesy that when a judgment is rendered against the Victor Co. in the dim and distant future the Victor Talking Machine Co. will be financially able to respond thereto? In that suit it will be a long, long time before trial can be reached, due to the congested condition of the calendar in the New Jersey district (Record 124). If an interlocutory decree is awarded to the plaintiff therein, then a petition for a rehearing may be filed, and if that petition is denied, then an appeal will be taken from the interlocutory decree. And if the decree is affirmed, then a petition for rehearing may be filed. If that is denied, possibly an application will be made to the Supreme Court for a writ of *certiorari*, which, if granted, would tie up the case for a period of time which no one can measure. And if after these various proceedings, the case is sent back to the lower court for an accounting, it will be necessary to overhaul the voluminous books and records of the Victor Co. and make an estimate of the cost of production and the profits, as well as the damages suffered by the plaintiff, and such an accounting would undoubtedly be prolonged to some distant time in the future which no man can estimate. And if we secure a judgment for a definite sum, exceptions may be filed before the court and arguments had thereon, and if the same be overruled a final decree will be entered, from which the Victor Co. can prosecute an appeal and again move for rehearings and writs

of *certiorari*. Under these circumstances, there is no mortal who can tell when the proceedings against the Victor Talking Machine Co. will come to a definite result. It may be five, ten, or fifteen years, or even more, and who is there can say that at the end of that period of time the Victor Co. will be able to respond to the judgment against it? Rich and powerful corporations who have figured as financial giants on Wall Street fail every day. Consider the New York, Hartford & New Haven R. R. Co., headed by the deceased Pierpont Morgan. A few years ago its stock was considered as good as a United States bond. Suddenly and without warning a financial crash came, and to-day the stock is of but little value. Ten days ago a great trans-continental railway, the Western Pacific, went into the hands of receivers, and such occurrences happen every day. There is no security whatever that at the end of the litigation against the Victor Talking Machine Co. in the dim and distant future, said company will be able to respond to the large judgment which we hope to secure against it. In the Stebler case, the court required a heavy bond by Parker for the payment of such judgment as might be rendered. No such offer was made by Sherman Clay & Co. in the present case. Their position is that the Victor Co. is at the present time able to respond to a judgment, and therefore they would be in the same position when a judgment is rendered against them at some indefinite time in the future.

F.

**AND FINALLY, THE FUNDAMENTAL REASON FOR THE RULING
IN STEBLER'S CASE WAS THE INEQUITABLE CONDUCT OF
THE PATENT OWNER.**

He began 31 useless suits against 31 innocent users, whereas he was able to obtain complete compensation in the parent suit against Parker. Both the lower court and this court held such conduct to be inequitable. But there is no such state of facts in the present case. Judge Van Fleet says in that behalf, at page 133 of the Record:

“That this action is being prosecuted or other actions threatened in any oppressive or vexatious spirit, I regard as fully negatived by the showing made in opposition to the motion; and should such spirit manifest itself by any future act of the plaintiff it will always be within the power of the court, upon proper application, to protect defendant, or those whom it represents, against its effect.”

As showing that plaintiff's conduct is not inequitable, we refer the court to pages 99, 100 and 101 of the Record.

II.

**The Victor Talking Machine Co. Defended the Action at
Law and is Defending the Present Suit in Equity
Against Sherman Clay & Co., and Hence There is no
Occasion to Suspend Prosecution of the Suit Until
the Determination of the New Jersey Case.**

Whatever may be decided in this case on final hearing will be binding upon the Victor Talking

Machine Co. and will become *res adjudicata*, and there is no reason, in the legal aspect, why the battle front should be shifted from California to New Jersey. The California suit was commenced first, and, therefore, the jurisdiction of the California court should not be made subservient to that of the New Jersey court. The New Jersey court should, and doubtless will, suspend the prosecution of the case there until the determination of the California case on the ground that the court which first acquires jurisdiction should be allowed to settle the controversy without interference and to the end that uniformity of decision may be obtained. There is no reason why the California district court should abdicate its jurisdiction in favor of the New Jersey district court, inasmuch as the Victor Talking Machine Co. is defending both cases. The Victor Co. voluntarily and of its own accord elected to defend the California case and should be compelled to abide by such election.

Judge Van Fleet says at page 132 of the Record:

“Under these circumstances the plaintiff was entirely within its rights in bringing this action and maintaining it; and the suit here having been first brought, and this court having thereby first obtained jurisdiction, and the cause being now ready for trial, and moreover, as appears from the showing, defended by the same party who is defendant in the New Jersey suit, there is nothing presented in the cases relied on which in equity or good conscience should dictate a postponement to await the disposition of the case against one standing in substantially the same relation to the subject matter”.

III.

The Question of Hardship.

In the Stebler case this court held that the institution of 31 equity suits against 31 customers of Parker in respect of 31 specific machines sold by Parker was a case of hardship and oppression, which would not be tolerated by a court of equity. This hardship arose from the fact that Parker was under obligation to protect his customers against infringement suits and it was his duty therefore to defend these 31 suits which had been brought against his customers in respect of the 31 specific machines involved, whereas those 31 specific machines could be accounted for in the parent suit against Parker which had already eventuated in an interlocutory decree. Under these circumstances to have permitted Stebler to prosecute, and to have compelled Parker to defend, those 31 suits in equity would have been clearly inequitable, harsh, and oppressive. It was for this reason that the lower court exercised its discretion and granted a preliminary injunction. No such facts are found in the case at bar. The Searchlight Co. has brought a test case against Sherman Clay & Co., which said case is being defended by the Victor Co. If the Searchlight Horn Co. had instituted a multiplicity of suits against the customers of the Sherman Clay Co. indiscriminately, it would be within the discretion of the court to stay their prosecution until the determination of the main case. It is alleged in the moving papers below, and it seems to be the basis of

the appellant's application, that the plaintiff has threatened to bring innumerable suits against other customers of the Victor Talking Machine Co.; but these allegations are squarely and positively denied, and Judge Van Fleet says at page 133:

“Under all the circumstances and having in mind the history of the litigation between the parties here, I am of opinion that it would be inequitable to deny plaintiff the right to proceed. That this action is being prosecuted or other actions threatened in any oppressive or vexatious spirit, I regard as fully negated by the showing made in opposition to the motion; and should such spirit manifest itself by any future act of the plaintiff it will always be within the power of the court, upon proper application, to protect the defendant, or those whom it represents, against its effect.”

All that plaintiff has done in this respect is to send warning letters to three dealers, who have persisted in infringing since the judgment against Sherman. Clay & Co. in the parent suit; but it clearly appears from the showing that there is no intention of instituting suits against either of those three dealers. In this behalf we ask the court to carefully read paragraph 10 of the answer of the appellee, beginning at the bottom of page 100 and ending on page 102 of the record.

It is true that there is an action at law pending against one other customer of the Victor Talking Machine Co., that is to say, an action against Wiley B. Allen & Co., in the district court for the Southern District of California; but the facts in regard

to that action are fully stated in paragraph 9 of appellee's answer, beginning at the bottom of page 99 of the Record. That suit was brought at the same time as the action at law against Sherman, Clay & Co., merely for the purpose of getting a speedy trial in case the action in the Northern District was not reached at an early date; but inasmuch as the action in the Northern District was reached and tried, the Allen suit in the Southern District was not pressed and has been lying dormant ever since, and probably will never be pressed for trial and will be ultimately dismissed.

And in this connection it may be pertinent to inquire by what right Sherman Clay & Co. can come into court and ask that an injunction be issued preventing the Searchlight Horn Co. from prosecuting suits against other customers of the Victor Talking Machine Co., even if it were a fact that the Searchlight Horn Co. was contemplating such action? Sherman Clay & Co. is itself only a customer of the Victor Co., and has no status in law which would give it a right to ask for injunctions against the prosecution of suits against other customers of the Victor Co. That is a matter which concerns only the Victor Co.

IV.

Question of Discretion.

The granting or refusing of preliminary injunctions is a matter which rests solely in the discre-

tion of a trial court, and the appellate court will not interfere with the exercise of such discretion except in a case of abuse thereof. This court has repeatedly announced this rule of law, and it is not necessary to cite cases in support thereof. The lower court exercised its jurisdiction in this respect by refusing the injunction, and there is no assignment of error on the part of appellant, nor any contention, that the lower court abused its discretion. The contention is that the appellant was entitled to the injunction as a matter of right. This is a misconception of the law. No litigant is ever entitled to a preliminary injunction as a matter of right. The granting or refusing of preliminary injunctions is wholly a matter of discretion. This view alone is sufficient to dispose of the appeal.

V.

The Matter of the Stipulation Between the Parties Filed August 24, 1914.

That stipulation appears at page 129 of the record and has been heretofore quoted in this brief. According to the said stipulation it is provided that the New Jersey case against the Victor Talking Machine Co. shall not, without the written consent of the plaintiff, be brought on for trial, nor shall any step be taken in that direction, prior to the final hearing of the case at bar. In other words, the case at bar must be tried and disposed of before the

trial of the New Jersey case. This stipulation was entered into by the counsel of both parties. It was entered into upon a consideration, which consideration consisted in the agreement to postpone the trial of the case at bar from the July to November term of the court. Defendants were not ready to try the case at the July term and asked for a continuance, and we granted the continuance in consideration of the solemn promise, agreement, and stipulation on the part of opposing counsel that the trial of the New Jersey case was to await the trial of the California case. And yet the learned counsel for appellant, in the teeth of this stipulation and in utter disregard of their solemn promise and agreement, ask for an injunction suspending the trial of the California case until after the trial of the New Jersey case. In all our practice we have never met with a more deliberate attempt on the part of reputable counsel to violate their solemn agreement entered into under their signatures and upon a consideration. We think that this conduct demands, and should receive some notice at the hands of this court. Attorneys are sworn officers of the court, and it is their duty to keep faith and to act honorably and uprightly towards opposing counsel, and one of their duties is to observe and live up to their agreements made in court. Here we have a deliberate attempt on the part of counsel to violate their solemn promise. We can look upon this appeal in no other light. If attorneys will not act honorably

and uprightly of their own accord, the court will compel them to do so.

Dated, San Francisco,
March 12, 1915.

Respectfully submitted,

JOHN H. MILLER,

Attorney for Appellee.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

SHERMAN, CLAY & COMPANY,	}	No. 2519
Appellant,		
vs.		
SEARCHLIGHT HORN	}	
COMPANY,		
Appellee		

PACIFIC PHONOGRAPH	}	No. 2518
COMPANY,		
Appellant,		
vs.		
SEARCHLIGHT HORN	}	
COMPANY,		
Appellee.		

Reply Brief for Appellants

N. A. ACKER,
Solicitor for Appellants.

Filed

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COMPANY,		
Appellee.		

REPLY BRIEF FOR APPELLANTS.

Owing to what is believed to be uncalled for criticism contained between pages 27 and 29 of appellee's main brief filed in connection with case No. 2519, relative to the stipulation printed in full on pages 5 and 6 of said brief, it is deemed only proper on behalf of the Eastern general counsel for appel-

lants to advise the Court fully concerning the actual circumstances in connection with the said stipulation.

The foregoing cases were placed on the 1914 July term calendar of the United States District Court, Second Division, Northern District of California, and were set for hearing August 25th, 1914. On the 3rd day of August, 1914, counsel for appellee served notice at San Francisco, California, on local counsel, as to the taking of rebuttal testimony in Pittsburg, Penn., at Warren, Ohio, and Cleveland, Ohio. The taking of this rebuttal testimony was commenced August 17, 1914, and concluded August 27, 1914, two days after the cases were set for hearing in this Circuit. Such testimony could not have been written up and received in the District Court under ten days from the conclusion thereof. Obviously, it was impossible for the cases to have been heard in this Circuit on August 25, 1914, and such must have been known to counsel for appellee.

The writer advised general counsel, J. Edgar Bull, Esq., located in New York City, that the cases in his opinion, could not be heard on the 25th of August, 1914, due to the absence of testimony. However, Mr. Bull, who intended making the journey to California to argue the cases on behalf of the defendants desired positive assurance that the cases would not be called for hearing on the 25th of August, and it was at the request of said general counsel that the writer requested Mr. Miller to stipulate. There was no urgent request for such stipulation, for the writer was satisfied that the cases could not be heard on August 25, 1914, and such

must have been known to Mr. Miller. However, the stipulation prepared by Mr. Miller was entered into on the writer's part as an assurance to general counsel, and the provisions of the stipulation were understood merely to provide against what is commonly termed dilatory practice in connection with the hearing of the cases in the 1914 October term of Court, but never contemplated the waiving of any legal rights relative to an appeal from the order denying the preliminary injunctions previously applied for.

The cases were thereafter set for hearing for November 24, 1914, and general counsel—J. Edgar Bull, Esq., arrived from New York to attend the hearings, and counsel for appellants were prepared and ready for argument of the cases. However, Mr. Miller had previously, on several occasions, intimated to the writer that these cases should be settled out of Court and requested that the matter be submitted to Mr. Bull on his arrival. This was done and Mr. Bull and Mr. Miller carefully considered the question, with the result that the writer was informed by said gentlemen that the cases were to be dropped from the October term calendar, and that Mr. Miller would visit New York City for the purpose of endeavoring to compromise the litigation. The cases were thereupon dropped from the calendar by Mr. Miller, and Mr. Bull returned East. Thereafter, Mr. Miller made the trip to New York for the purpose of endeavoring to negotiate with the main infringers relative to an amicable settlement out of Court. What took place in New York

is unknown to the writer, excepting the fact that a settlement of the litigation was not concluded.

During the whole of the times mentioned, the present appeals were being perfected.

In view of the foregoing circumstances, it is unjust at this time to charge appellants' counsel with bad faith.

Regarding that portion of the brief appearing on page 20, relative to the delay in securing a hearing in the New Jersey Court where the suits are now pending against the main infringers to the litigation, and from whom full recovery may be had, answer thereto is found in the telegram of March 17, 1915, this day received from Messrs. Fenton & Blount of Philadelphia, Penn., general counsel for the Victor Talking Machine Company, reading as follows:

“Trenton cases against Victor and Edison are both on Equity calendar to be called Tuesday, April sixth, and counsel notified by Clerk that Court will require answer to the cases. Think you should communicate this fact to your Appellate Court at once.”

It will thus be seen that the cases pending against the main infringers will be called at an early date in the New Jersey Court and when the calendar is called they will, on the part of such defendants, be set down for hearing. It is our wish at this time, and always has been, to secure an early hearing of the suits pending against the main infringers to the present litigation.

Counsel for appellees persistently throughout his brief, refers to the appellants respectively as distributing agents of the Victor Talking Machine Company and Thomas Edison, Inc., but such is not the case. The appellants are purchasers of such main infringers, and the horns herein complained of as infringements are horns purchased by the appellants of the main infringers, and for such horns the main infringers are liable for in any accounting had in connection with the New Jersey suits.

In case 2519, Mr. McCarthy, Managing Director of Sherman, Clay & Company, states in his affidavit that all of the horns complained of herein are phonographic horns purchased from the Victor Talking Machine Company, record p. 41.

Mr. Haddon, director and Vice-President of the Victor Talking Machine Company in his affidavit states that the horns complained of were supplied by his company to Sherman, Clay & Company, record p. 47.

In case 2518, Mr. Pommer, President of the Pacific Phonograph Company, states in his affidavit that all of the horns complained of as infringement are horns purchased by the Pacific Phonograph Company from Thomas A. Edison, Inc., record p. 43.

Thus it will be seen that the appellant companies herein purchased the horns complained of from the respective main infringers.

Inasmuch as by stipulation entered into between counsel, all testimony taken in connection with the cases involved herein may be used as testimony in the suits pending in the United States District

Court for the District of New Jersey against the main infringers, the hardship complained of by the appellee, by being placed to large and heavy expense in connection with the retaking of its testimony is eliminated by such stipulation.

It is respectfully submitted that the appellee can obtain full recovery in the suits now pending against the main infringers for all acts of infringement not only claimed herein against the appellants, but equally so for all acts of infringement by the innumerable dealers throughout the United States handling the alleged infringing horns purchased from the said main infringers. Thus, in the main suits the entire litigation may be disposed of, and settlement made therein for all acts of infringement committed by the many hundred of purchasing dealers, and the litigation brought to a speedy conclusion.

N. A. ACKER,

Solicitor for Appellants.

